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ALEXANDER L. STEVAS,
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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

v.

THE STATE OF CALIFORNIA, acting by and
through Governor Edmond G. Brown, Jr., *et al.*,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTION PRESENTED¹

Whether the lower court erred in holding that the initial leasing stage of an Outer Continental Shelf (OCS) project "directly affect[s]" a state's coastal zone and must be preceded by a written determination that it can be conducted "to the maximum extent practicable, consistent with approved state management programs" pursuant to Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), because activities might be authorized at later stages of the project which could possibly affect the coastal zone?

¹ Petitioners disagree with the Ninth Circuit's holding that environmental groups and local governments have standing to sue under Section 307(c)(1) of the CZMA. However, since petitioners do not challenge California's standing, they will not present a question in this petition concerning the standing of other parties. See *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981).

PARTIES TO PROCEEDINGS BELOW

This litigation was instituted through separate, but virtually identical, complaints filed by the State of California, acting through Governor Brown, and five agencies of the State government and by the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53.

Plaintiffs sued James G. Watt, the Secretary of the Interior, as well as Edward Hastey and Robert Burford, both of whom hold positions within the Department of the Interior. Also named as defendants were the Department and its Bureau of Land Management.

Intervening as defendants and appearing as appellants in the Ninth Circuit were the Western Oil and Gas Association, a regional trade association, and twelve of its members, Amoco Production Company, Atlantic Richfield Company, Champlin Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco Inc., Elf Aquitaine Oil & Gas Co., Exxon Corp., Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co.²

² The parties joining in this petition are the Western Oil and Gas Association, Amoco Production Company, Atlantic Richfield Company, Champlin Refining Co., Conoco Inc., Elf Aquitaine Oil & Gas Co., Exxon Corp., Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Pursuant to Rule 28.1 of the Supreme Court Rules of the United States, the corporate parties name their parent companies, subsidiaries, and affiliates as follows:

Amoco Production Co.—Amoco Australia Ltd.; Amoco Canada Petroleum Co. Ltd.; Amoco Credit Corp.; Amoco Oil Holdings S. A.; Amoco (U.K.) Exploration Co.; Analog Devices Inc.; Cetus Corp.; Chicago Bank of Commerce; Cyprus Mines Corp.; Solarex Corp.; and Standard Oil Co. (Indiana).

Atlantic Richfield Co.—Alyeska Pipeline Serv. Co.; Badger Pipe Line Co.; Black Lake Pipe Line Co.; Chapin, Kieley &

Subsequently, various local governmental entities within California intervened as plaintiffs in the case commenced by the State: The Counties of Humboldt, Marin,

Howe, Inc.; Colonial Pipe Line Co.; Cook Inlet Pipe Line Co.; Delaware Bay Transp. Co.; Dixie Pipe Line Co.; East Texas Salt Water Disposal Co.; Flower Street Ltd.; Gravity Adjustment, Inc.; Griffith Consumers Co.; Hardy Oil Co.; Hydrokem Performance Chem. Co.; Iricon Agency Ltd.; Kenai Pipe Line Co.; Lavan Petroleum Co.; Montoro, Empresa Para La Industria Quimica; Nihon Oxirane Co. Ltd.; Oil Shippers Serv., Inc.; Ontario Terminals, Inc.; Platte Pipe Line Co.; Sinclair Venezuelan Oil Co.; Tecumseh Pipe Line Co.; Texas-New Mexico Pipe Line Co.; and Trans Mountain Oil Pipe Line Co.

Champlin Refining Co.—Esperanza Pipeline Corp.; Rocky Mountain Energy Co.; Union Pacific Corp.; Union Pacific R.R. Co.; and Upland Indus. Corp.

Conoco, Inc.—E. I. du Pont de Nemours & Company; Big Sky of Montana Realty, Inc.; Calcasieu Chem. Corp.; Cit-Con Oil Corp.; Conch Intl. Methane Ltd.; Condea Chemie GmbH; Felix Oil Co.; Kettleman North Dome Assoc.; Long Beach Oil Dev. Co.; Maritime Protection A/S; Nippon Aluminum Alkyls, Ltd. (NAA); Nissan-Conoco Corp. (NCK); Oil Shippers Serv., Inc.; (OMW) Oberrheinische Mineraloelwerke GmbH; PASA Petroquimica Argentina, S.A.; Petrocokes, Ltd.; Petroleum Terminals, Inc.; Petroquimica Espanola, S.A. (PETRESA); Southern Facilities, Inc.; The Standard Shale Products Co.; T.A.L.; and Tidelands Royalty Trust.

Elf-Aquitaine Oil & Gas Co.—Azufres Nationale Mexicanos, S.A. de C.V.; Compania Exploradora del Istmo, S.A.; Cripple Creek Victor Gold Mining Co.; St. Laurens Harbor Storage Co.; and Societe National Elf Aquitaine.

Exxon Corp.—Exxon Pipeline Co.; Imperial Oil Ltd.; and Reliance Elec. Co.

Getty Oil Co.—Butte Pipe Line Co.; Cable Enterprises, Inc.; Canadian Reserve Oil and Gas Ltd.; Chase Terminal Co.; Chase Transp. Co.; Chemplex Co.; Chemplex Constr. Corp.; Chisholm Pipeline Co.; Crescent Petroleum Co.; Dieter Pohlmann & Co. GmbH; Entertainment and Sports Programming Network, Inc.; Gibson Holdings, Ltd.; Gibson Petroleum Ltd.; Halbouty Alaska Oil Co.; Iricon Agency Ltd.; MAGEC Finance Co.; Mitsubishi Oil Co., Ltd.; Northern Tier Pipeline Co.; Osage Pipe Line Co.; Seminole Pipeline Co.; Texas-New Mexico Pipe Line Co.; Texoma Pipe Line Co.; Tide Water Oil Co. (India) Ltd.; Wascana Pipe Line, Inc.; and Yong-Nam Chemical Co., Ltd.

Mendocino, Monterey, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma; the Cities of Brisbane, Capito-

Gulf Oil Corp.—Allied-General Nuclear Serv.; Bio Research Center Co., Ltd.; Colonial Pipeline Co.; Delaware Bay Transp. Co.; Dixie Pipeline Co.; Explorer Pipeline Co.; Laurel Pipe Line Co.; Mid-Valley Pipeline Co.; Midwest Carbide Corp.; Oil Shippers Serv., Inc.; Oklahoma Nitrogen Co.; Paloma Pipe Line Co.; Pembroke Capital Co.; Platte Pipe Line Co.; Rio Blanco Oil Shale Prshp.; Valley Pines Assoc.; and West Texas Gulf Pipe Line Co.

Phillips Petroleum Co.—Acurex Corp.; Aero Oil Co.; Alyeska Pipeline Serv. Co.; Arctic LNG Transp. Co.; Bruin Carbon Dioxide Sales Corp.; Calatrava, Empresa Para la Industria Petroquimica, S.A.; Canada Western Cordage Co. Ltd.; Canyon Reef Carriers, Inc.; Chisholm Pipeline Co.; Cochin Refineries Ltd.; Colonial Pipeline Co.; Compagnie Francaise du Carbon Black, S.A.; Dixie Pipeline Co.; Drisco, S. A. de C.V.; East Texas Salt Water Disposal Co.; Everglades Pipe Line Co.; Explorer Pipeline Co.; Heat Transfer Research, Inc.; Insurance and Reinsurance Brokers (Bermuda) Ltd.; Iranian Marine Intl. Oil Co.; Kaw Pipe Line Co.; Kenai LNG Corp.; Negromex, S.A.; Nordisk Philblack AB; Nordisk Kemi AB; Norland GmbH Fur Grundbesitz Und Industrieanlagen; Norpipe a.s; Norpipe Petroleum UK Ltd.; Norseas Gas A/S; Norseas Gas GmbH; Norseas Pipeline Ltd.; Oil Insurance Ltd.; Papago Chem., Inc.; Petrochim; Phillips Carbon Black Co. (Proprietary) Ltd.; Phillips Carbon Black Italiana S.p.A.; Phillips Carbon Black Ltd.; Phillips Gas Supply Corp.; Phillips-Imperial Petroleum Ltd.; Phillips Pacific Chem. Co.; Phillips Petroleum Singapore Chem. (Private) Ltd.; Philmac Oils Ltd.; Philmac Panama Inc.; Plasticos Vanguardia, S.A.; Polar LNG Shipping Corp.; Quimica Venoco C.A.; Renolit-Fertighaus GmbH; The Salk Institute Biotechnology/ Industrial Assoc., Inc.; Sevalco (Holdings) Ltd.; Sevalco Ltd.; Spodco Ltd.; Texas Offshore Port, Inc.; Transatlantic Reinsurance Co.; Trenwick Ltd.; Venezoil, C.A.; Western Desert Operating Petroleum Co.; and White River Shale Oil Corp.

Shell Oil Co.—Basin Pipe Line System; Bullenbay Marine Serv., N.V.; Business Dev. Corp. of North Carolina; Butte Pipe Line Co.; Capline System; Capwood Pipe Line System; Cortez Capital Corp.; Crown-Shell Baytown Feeder Line System; Curacao Oil Terminal, N.V.; Dixie Pipeline Co.; East Texas Salt Water Disposal Co.; Explorer Pipeline Co.; First Harlem Secur-

la, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside; and the Association of the Monterey Bay Area governments.

ities Corp.; Gravcap, Inc.; Heat Transfer Research Inc.; Inland Corp.; LOCAP, Inc.; LOOP, Inc.; MESBIC Financial Corp. of Houston; Oil Companies Institute for Marine Pollution Compensation Ltd.; Oil Insurance Ltd.; Olympic Pipe Line Co.; Ozark Pipe Line Co.; Plantation Pipe Line Co.; Rancho Pipe Line System; Royal Dutch Petroleum Co.; Seadock, Inc.; Shell Petroleum, N.W.; The "Shell" Transport and Trading Co. Ltd.; Ship Shoal Pipe Line System; Thums Long Beach Co.; West Shore Pipe Line Co.; and Wolverine Pipe Line Co.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 683 F.2d 1253 and is reprinted in Appendix A(1a). The opinion of the United States District Court for the Central District of California is reported at 520 F. Supp. 1359 and is reprinted in Appendix B(37a).

JURISDICTION

On August 12, 1982, the United States Court of Appeals for the Ninth Circuit entered a judgment affirming in part, reversing in part, vacating in part, and staying in part the decision of the District Court. The Ninth Circuit's judgment is reprinted in Appendix C(90a). On November 10, 1982, that court denied petitions for rehearing filed by California and the environmental

group plaintiffs. The court's order denying rehearing is reprinted in Appendix D(91a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1) (1976), provides:

"Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."

Section 19 of the Outer Continental Shelf Lands Act (OCSLA), as amended, 43 U.S.C. § 1345 (1980), provides in pertinent part:

"(a) Any Governor of an affected State or the executive of any affected local government in such State may submit recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale

* * *

"(c) The Secretary [of the Interior] shall accept recommendations of the Governor . . . if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State. . . ."

"(d) The Secretary's determination that recommendations provide, or do not provide, for a reasonable balance between the national interest and the well-being of the citizens of the

affected State shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale . . . unless found to be arbitrary or capricious."

STATEMENT OF THE CASE

This case involves the Department of the Interior's decision to offer for leasing 29 tracts in the Santa Maria Basin located in federal waters, more than three miles off shore the California Counties of Santa Barbara and San Luis Obispo, as part of OCS Sale No. 53. The lower courts held that the Department properly decided that the leasing of those tracts was in the national interest, as required by Section 19 of the OCSLA, and was in compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1976), and the Endangered Species Act (ESA), 16 U.S.C. § 1531 (1976). Nonetheless, the lower courts enjoined leasing of the tracts on the ground that Section 307(c)(1) of the CZMA required the Secretary of the Interior to make a written determination that such leasing is consistent to the maximum extent practicable with California's CZMA program.

A. The Administrative Process Preceding Interior's Decision

Four years of planning and analysis preceded the leasing of OCS tracts in the Santa Maria Basin. Pursuant to NEPA, an extensive environmental impact statement (EIS) was compiled. Pursuant to the ESA, the Fish and Wildlife Service (FWS) provided a biological opinion that the Secretary's proposed offering of Santa Maria Basin

tracts "is not likely to jeopardize the continued existence of the [Southern] sea otter," a "threatened species" under the ESA. Pursuant to Section 19 of the OCSLA, the Department of the Interior received and reviewed the recommendations of Governor Brown of California that the 34 northernmost Santa Maria Basin tracts (out of 115 proposed for leasing) should not be leased since they are "directly seaward of the habitat, breeding, and food supply areas of the Southern Sea Otter." C.R. 85; A.R. 224w at 2.

Notwithstanding the NEPA, ESA and OCSLA processes, California sought to bar leasing of the northern Santa Maria Basin tracts adjoining the sea otter habitat by invoking the CZMA. On December 16, 1980, the California Coastal Commission (CCC) adopted a resolution objecting to the leasing of the 31 northern tracts within 12 miles of the range of the southern sea otter. C.R. 85; A.R. 217w. This resolution was grounded upon the CCC's concern with the possibility that production of oil might years later occur on those tracts and give rise to the possibility of an oil spill which might impact that species.³

Ultimately on April 10, 1981, having the NEPA, ESA, and OCSLA record before him, as well as the CCC's CZMA resolutions, the Secretary of the Interior determined to proceed with the leasing of all 115 Santa Maria Basin tracts. In so doing, he first determined that the leasing stage of the Sale No. 53 project would not "directly affect" the California coastal zone within the meaning of Section 307(c)(1) of the CZMA. Instead, the Secretary

³ The CCC reiterated this concern in a resolution of March 31, 1981, and paradoxically relied upon the FWS biological opinion as to the sea otter, even though the FWS had found that the preliminary stages of leasing and exploration would not jeopardize that species and could therefore proceed. C.R. 85; Attachment to A.R. 406w at 13.

concluded that all coastal zone impacts which might possibly occur would arise at the later stages of the project and would be subject to CZMA analysis at that time.

The Secretary then analyzed Governor Brown's recommendation to delete the 34 northern Santa Maria Basin tracts. In responding to the Governor's recommendation, the Secretary stated that

"[o]ur initial purpose in offering these tracts is to permit exploration so that the potential oil and gas reserves, if any, can be inventoried. . . . Later, should recoverable reserves be identified, the OCS Lands Act would require further environmental documentation and safeguards [prior to development and production of those reserves]." *Id.* C.R. 85; A.R. 461w.

The Secretary ultimately concluded that the "national benefits [in proceeding with leasing] far outweigh[] the potential for harm to the well-being of the citizens of California." *Id.*

B. Proceedings in the Lower Courts

1. The District Court's Decision

On April 29, 1981, California and various environmental groups filed separate complaints seeking an injunction against leasing the 34 northernmost Santa Maria Basin tracts under the OCSLA, NEPA, ESA, and the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 (1976). They sought similar relief against leasing 31 of those tracts under Section 307(c)(1) of the CZMA.

On May 27, 1981, the district court tentatively rejected plaintiffs' OCSLA, NEPA, ESA and MMPA claims. However, it held that plaintiffs had shown a probability of success on their CZMA theory that OCS leasing "directly affect[s]" a coastal zone and thus cannot be conducted in

the absence of a formal determination that leasing will be consistent with an approved CZMA program. The court, therefore, entered a preliminary injunction which allowed the bids on the CZMA-challenged tracts to be opened, but enjoined the Secretary from accepting those bids.

On May 28, 1981, the Santa Maria Basin lease sale took place as scheduled.⁴ Bids on 19 of the CZMA-challenged tracts were submitted, collectively totalling more than \$220 million.

On August 18, 1981, the district court entered summary judgment for California and the local governments on their CZMA claim. The district court found that the Department of the Interior's leasing of OCS tracts "would invariably directly affect the coastal zone in all but the most unusual case—a case which probably could only be posed as a hypothetical" (71a). In the trial court view, the "direct" effects, which triggered the command of Section 307(c)(1) that leasing be conducted "in a manner that is consistent, to the maximum extent practicable, with" the California Coastal Management Program (CCMP), were the potential impacts that might arise at the later post-leasing stages of the Sale No. 53 project. (72a-73a). Since Interior had not determined that these potential impacts were consistent with the CCMP, the court issued a permanent injunction cancelling the sale of all the CZMA-challenged tracts.⁵

⁴The final notice consolidated the 115 tracts that had been described in the proposed notice sent to Governor Brown into 111 tracts covering precisely the same area. By virtue of this consolidation, the 34 tracts complained of by the Governor were reduced to 32 and the 31 focused upon by the CCC were reduced to 29.

⁵The district court stayed its injunction to provide defendants an opportunity to apply to the Ninth Circuit for a stay pending appeal. On August 26, 1981, that court granted that stay.

The district court entered summary judgment for defendants on all of the other issues and ruled that environmental groups had no standing to invoke the CZMA.

2. The Ninth Circuit's Decision

Both sides filed cross appeals, and on August 12, 1982, the Ninth Circuit rendered its opinion. (1a). Adopting the trial court's characterization of the "direct" effects of an OCS lease sale, the court held that the Secretary's decision to select particular tracts for leasing "established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased." (14a).

Although agreeing with the district court that Section 307(c)(1) required the Department of the Interior to make a consistency determination before proceeding with leasing, the court of appeals, unlike the district court, held that federal activities need be consistent with a state CZMA program only "to the maximum extent practicable." (21a, 24a).

The Ninth Circuit disclaimed the ability to delineate how such consistency might be achieved in this or future cases. Stating that "verbal formulas cannot eliminate the necessity of examining each situation with care," the court noted that future disagreements between the States and federal agencies concerning consistency determinations would be subject to mediation within the Department of Commerce. (25a). Although the Ninth Circuit did not refer to them, applicable regulations defining mediation procedures, 15 C.F.R. § 930.43, make it

clear that they are voluntary, nonbinding, and, in serious disputes, merely a prelude to later federal litigation.⁶

After thus disposing of the merits of the CZMA dispute, the court held that environmental groups have standing under the APA, 5 U.S.C. § 702, to institute litigation demanding the preparation of a consistency determination.⁷

The Ninth Circuit affirmed the trial court's rulings for defendants under both NEPA and Section 19 of the OCSLA.⁸ As to the latter, it recognized the narrow scope of review open to a court and upheld the Secretary of the Interior's rejection of the Governor's recommendations to delete the northern Santa Maria Basin tracts and his determination that the leasing of those tracts was in the national interest. (30a-31a).⁹

⁶The court stayed the district court's injunction cancelling the CZMA-disputed portion of the Santa Maria Basin sale, pending the Department of the Interior's preparation of a determination that its decision to lease the northern Santa Maria Basin tracts was consistent with the CCMP. The court of appeals left open the question whether it would uphold the district court's cancellation of the sale if it were to find the consistency determination inadequate. (26a).

⁷The court did not explicitly address defendants' challenge to the local governments' standing. However, both its mandate and the rationale it used to extend standing to environmental groups reveal that it rejected defendants' appeal on this point.

⁸Plaintiffs did not appeal the district court's ESA or MMPA rulings.

⁹On petitions for rehearing, plaintiffs argued that the Ninth Circuit had misconstrued the term "maximum extent practicable" in Section 307(c)(1) when it rejected their claim that the Department of the Interior must conform to a state's interpretation of its CZMA program. Plaintiffs contended that the lower court's interpretation of the statute was inconsistent with rules published under Section 314

THE QUESTION PRESENTED IS SUBSTANTIAL

This Court Should Review the Ninth Circuit's Determination that the Secretary of the Interior's Leasing of OCS Tracts is Governed by the CZMA.

If the lower courts' construction of the phrase "activit[y] directly affecting" the coastal zone is left unreviewed by this Court, the Department of the Interior will be compelled for all future OCS lease sales to survey all potential impacts of an OCS project, even if distant in time or remote in probability, and, on the basis of this highly speculative data, seek to conform its leasing of OCS tracts "to the maximum extent practicable" with state CZMA programs. Such a requirement will give rise to disputes which ultimately must be resolved in federal litigation as to whether the proper degree of consistency has been achieved.¹⁰

of the CZMA, 16 U.S.C. § 1463, by the National Oceanic and Atmospheric Administration. See 15 C.F.R. § 930.32. On November 10 the Ninth Circuit denied plaintiffs' petitions for rehearing without opinion.

¹⁰ Petitioners' concern with litigation under Section 307(c)(1) spawned by the Ninth Circuit's ruling is not based on mere speculation. Following the district court's ruling in this case, the States of California, New Jersey, and North Carolina, as well as the North Slope Borough in Alaska, have filed lawsuits under that section challenging Interior's selection of tracts for OCS sales or the lease stipulations adopted for operations on those tracts. See *California v. Watt*, 17 E.R.C. 1711 [BNA] (C.D. Cal. June 11, 1982) (Sale 68); *Kean v. Watt*, No. 82-2420 (D.N.J.) (Sale RS-2); *North Carolina v. Watt*, No. 81-472-CIV-5 (E.D.N.C.) (Sale 56); *North Slope Borough v. Watt*, No. A82-421 (D. Alaska) (Sale BF).

The Ninth Circuit's grant of standing to parties unaffiliated with the State heightens petitioners' concern with Section 307(c)(1) litiga-

1. Given the consequences attached to its proper construction, the Ninth Circuit should have analyzed with painstaking care the term "activit[y] directly affecting" the coastal zone to ensure that its interpretation of the statute was the one intended by Congress. See *Griffin v. Oceanic Contractors, Inc.*, ____ U.S. ____, 102 S.Ct. 3245, 3250 (1982) ("There is of course no more persuasive evidence of the purpose of the statute than the words by which the legislature undertook to give expression to its wishes.")¹¹ However, this Court will search the Ninth Circuit's opinion in vain for any recognition of its obligation to give effect to the terms of Section 307(c)(1).

This omission is not remedied by recourse to the district court's opinion. To the contrary, the district court chastised defendants for the "invocation of the plain meaning rule" which it held would merely "cloud the issue." It held that "reliance on the plain meaning rule" was "verbal table thumping" that would be a "subterfuge in the present case" producing "an unreasonable result." (67a).

Rather than addressing the plain terms of the statute, both the Ninth Circuit and the district court erroneously based their decisions upon their perception of the purposes of the CZMA and upon statements of congressional committees made eight years after the enactment of Sec-

tion. In two cases within the past year, private environmental groups and local governments have invoked that section against portions of OCS lease sales not challenged by the adjacent State. *California v. Watt*, *supra*; *North Slope Borough v. Watt*, *supra*.

¹¹ See also *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 162 (1981); *CBS v. FCC*, 453 U.S. 367, 377-79 (1981); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 508 (1981); *Howe v. Smith*, 452 U.S. 473, 488 (1981).

tion 307(c)(1). See pp. 18-19, *infra*. In so ignoring the plain meaning of Section 307(c)(1), as well as subsequent amendments to the CZMA and OCSLA integrating the two statutes, the lower courts committed error that would justify review by this Court even in a case with lesser consequences. *A fortiori*, such an error should be corrected by this Court when, as here, it threatens to erect litigation obstacles to the nation's foremost energy program, the expedited development of oil and gas from our OCS. See *Watt v. Energy Action Educational Foundation*, 454 U.S. 151 (1981).

2. Proper application of the plain meaning rule would have led the lower courts to a different result in this case.

This case concerns solely the leasing stage of an OCS project. This stage involves the selection of particular tracts for leasing, the conduct of an OCS lease sale, and the award of leases. Leasing is followed by two other distinct stages which are preceded by Department of the Interior decision-making and state CZMA review: exploration and production.

At the leasing stage, the Department itself takes no action having any physical impacts upon a coastal zone and normally authorizes no action by lessees which are likely to have such effects. As the D.C. Circuit held in *North Slope Borough v. Andrus*, 642 F.2d 589, 593-94 (D.C. Cir. 1980):

"[a]s provided in the [OCSLA], the lease sale itself is only a preliminary and relatively self-contained stage within an overall oil and gas development program which requires substantive approval and review prior to implementation of each of the major stages: leasing, exploring, producing.

". . . Once the Secretary accepts 'high' bids and executes leases, lessees are permitted by federal law,

Department regulations and lease stipulations to engage only in 'preliminary activities.' " (Emphasis and footnote omitted.)¹²

Here, neither of the lower courts found that any environmental impacts were expected during the leasing stage of the OCS No. 53 project or that any operations during that stage would affect the California coastal zone.

Moreover, little was said by the lower courts about coastal zone impacts associated with the second stage of an OCS project—exploration. As was implicitly recognized below (72a-73a) and as other courts have explicitly stated,¹³ the environmental impacts of exploration are minimal. Indeed, in this case the FWS based its biological opinion, which sanctioned both leasing and exploration, on the premise that there was a very low risk of exploration oil spills. (83a).

In any event, such minimal coastal zone impacts as may occur during exploration are clearly subject to prior Department of the Interior authorization and state CZMA scrutiny: An OCS lessee must file a plan describing the operating procedures which it intends to follow, and exploration may be authorized only if the exploration-related coastal zone impacts are consistent with applicable state CZMA programs. Section 11(c)(2), OCSLA, 43 U.S.C. § 1340(c)(2); Section 307(c)(3)(B), CZMA, 16 U.S.C. § 1456(c)(3)(B).

¹² See also *Conservation Law Foundation v. Andrus*, 623 F.2d 712, 715 (1st Cir. 1979); *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1378 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978).

¹³ *Village of Kaktovik v. Watt*, 689 F.2d 222, 225-26 (D.C. Cir. 1982).

Most of the impacts relied upon by the lower courts as showing that OCS leasing is an "activit[y] directly affecting" the California coastal zone—pipeline construction, spills from platforms, migration of labor into the area (72a-73a)—are potential impacts which cannot occur until the much later development/production stage of the project. In many cases, this stage is never reached since exploration often fails to discover any commercial quantities of OCS oil or gas; in virtually no case are all portions of an area that is made available for leasing later committed to development and production.¹⁴

Even if this third stage of an OCS project is reached, a lessee must submit a development and production plan for departmental approval. Section 25 OCSLA, 43 U.S.C. § 1351. The lessee must also certify that the "activities" proposed in its development/production plan "affecting land or water uses within a coastal zone" are consistent with a state CZMA program. Section 307(c)(3)(B), CZMA, 16 U.S.C. § 1456(c)(3)(B). The Department retains authority to disapprove this stage, if, after consideration of statutorily defined factors, it concludes that development and production would "probably cause serious harm or damage . . . to the marine, coastal or human environment. . . ." 43 U.S.C. § 1351(h)(1)(D). It must disapprove development/production if the lessee fails to satisfy the requirements of the CZMA. 43 U.S.C. § 1351(h)(1)(B).

¹⁴ After heated litigation at the leasing stage of OCS Sale No. 39 (Gulf of Alaska), No. 40 (Baltimore Canyon), and No. 42 (Georges Bank), exploration was allowed to proceed, but has not to date produced sufficient evidence of commercial quantities of oil and gas to justify development and production. See generally *Alaska v. Andrus*, 580 F.2d 465 (D.C. Cir.), vacated in part as moot, 439 U.S. 922 (1978); *Conservation Law Foundation v. Andrus*, *supra*; *County of Suffolk v. Secretary of the Interior*, *supra*.

Clearly, OCS leasing does not "directly" affect the coastal zone merely because there is some possibility that years later operations might be authorized which would have physical impacts upon the coastal zone. In holding to the contrary here, the lower courts have simply ignored the plain terms of the statute.¹⁵

This conclusion is buttressed by the fact that neither court offered any definition of the terms of Section 307(c)(1) to support its construction of the Act. Had the lower courts adopted any of the conventional definitions for the term "directly" recited by the district court—"simultaneously"; "without any intervening agency or instrumentality of a determining influence"; "without any intermediate step"; "without a moment's delay"; "at once, immediately" (66a-67a)—they could not have concluded that OCS leasing "directly affect[s]" the coastal zone. In equating "directly affecting" with "the first link in a chain of events" possibly leading to impacts on the coastal zone

¹⁵ Regulations interpreting closely analogous statutory language under NEPA are inconsistent with the lower courts' view of the CZMA. NEPA requires analysis of "major federal action significantly affecting the environment." 42 U.S.C. § 4332(2)(c). Thus, NEPA regulations require an impact statement to discuss both "direct" and "indirect" effects of such actions. 40 C.F.R. § 1502.16. However, in defining those terms, NEPA regulations clearly define as "indirect effects" the type of impacts relied upon by the lower courts here as the basis for applying Section 307(c)(1):

" 'Effects' include:

(a) direct effects, which are caused by the action and occur at the same time and place.

(b) indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8.

at later stages of an OCS project, the lower courts read the term "directly" out of the statute. (14a).¹⁶

3. Congress went to unusual lengths to specify the manner in which the CZMA should be applied to OCS projects. In doing so, it articulated a view of the statute contrary to the one embraced by the lower courts.

The 1980 committee reports upon which the lower courts relied state that the original 1972 CZMA, which enacted Section 307(c)(1), gave the States "no part in any decision concerning development on the [OCS]."¹⁷ In 1976 Congress amended the CZMA, but left Section 307(c)(1) intact. However, Section 307(c)(3)(B), 16 U.S.C. § 1456(c)(3), was added to the statute to permit the States to apply their CZMA programs at the later exploration and production/development stages of OCS projects, not at the leasing stage. As the 1976 Conference Report

¹⁶ No other circuit has construed Section 307(c)(1) as it applies to the initial leasing stage of an OCS project. However, *California v. Watt*, 668 F.2d 1290 (D.C. Cir. 1981), rejected contentions advanced by California that the Secretary was obliged to consider California's CZMA program when he included Sale No. 53 on the five-year leasing schedule published under Section 18 of the OCSLA, 43 U.S.C. § 1344. Instead, the D.C. Circuit held that the CZMA applies to "specific proposed activities" and referred to that part of the CZMA which is applicable to the exploration and development/production stages of an OCS project. 668 F.2d at 1310-11 & n.99.

Although the D.C. Circuit's opinion was emphasized in defendants' briefs and oral argument, the Ninth Circuit did not refer to it. This omission is particularly significant, since the inclusion of a particular sale on the five-year leasing schedule fits the Ninth Circuit's "first link" characterization of the type of OCS decision requiring CZMA analysis. See 43 U.S.C. § 1344(d)(3), providing that the inclusion of a sale on the five-year schedule is a necessary prerequisite to the Department's subsequent conduct of a lease sale.

¹⁷ H.R. Rep. No. 1012, 96th Cong., 2d Sess. 26 (1980).

stated, this amendment "applie[d] the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior." S. Conf. Rep. No. 987, 94th Cong., 2d Sess. 30 (1976).¹⁸

In 1978 when Congress amended the OCSLA, it specifically integrated the CZMA and OCSLA in a manner fully consistent with the 1976 amendments to the CZMA and equally inconsistent with the result reached by the courts below. In 43 U.S.C. § 1802(6), Congress described one of

¹⁸ The legislative history underlying the 1976 amendments vividly illustrates Congress' intention not to apply the CZMA to the leasing stage of OCS projects. A proposed amendment to Section 307(c)(3) would have added the term "lease" to the "license" and "permit" which are subject to a consistency review under that section. This amendment was characterized by the Senate Committee as having the very effect which the lower courts have now read into Section 307(c)(1):

"[i]n practical terms, . . . the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies." S. Rep. No. 277, 94th Cong., 1st Sess. 20 (1975).

The amendment was opposed by the Department of the Interior on the ground that it might be construed as a "requirement that the lease applicant prove Federal consistency before he is physically able to do it." Hearings on CZMA before Subcommittee on Oceanography of House Committee on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 204 (1975). Because of these and similar concerns, the amendment that would have added the term "lease" to Section 307(c)(3) was deleted on the House floor to permit further clarification of the matter in conference. 122 Cong. Rec. 6128 (1976). The conference decided not to subject leases to CZMA consistency review.

the basic purposes underlying the 1978 amendments to the OCSLA as

"[a]ssur[ing] that States . . . which are directly affected by exploration, development, and production of oil and natural gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the [OCS]."

Congress thus recognized that States would be "directly affected" by the later stages of an OCS project, but not by leasing itself. Because of these later "direct" effects, Congress provided "an opportunity [for States] to participate in policy and planning decisions" in the OCSLA.

Section 19 of the OCSLA provides that opportunity with respect to OCS leasing. It gives the States the right to submit "recommendations" as to the "size, timing or location" of OCS leasing to the Secretary which he shall accept, unless through his assessment of the national interest, which that section describes as "final," he concludes that more expansive leasing is required.¹⁹ As noted, California submitted Section 19 recommendations in this case, and the lower courts upheld the Secretary's determination that the national interest justified the leasing of those tracts to which the State objected.

Section 19 is silent as to CZMA review at the leasing stage. However, in the light of the "direct" effects poten-

¹⁹ The States are also provided the opportunity to participate in policy and planning decisions at the even earlier stage when a five-year leasing program is being developed. See p. 18, n.20 *infra*. At that point, States are given the right to submit comments upon the program, and the Secretary must provide Congress with a written explanation as to how he dealt with those comments. 43 U.S.C. § 1344(c) & (d).

tially suffered by the States at the exploration and production/development stages, the OCSLA explicitly recognizes that their CZMA programs apply at those stages. 43 U.S.C. § 1340(c)(2) (exploration); 43 U.S.C. § 1351(h)(1) (production/development).³⁰

4. The lower courts erroneously relied upon what they perceived to be the "purposes" of the CZMA and upon 1980 post-enactment statements by congressional committees concerning the scope of Section 307(c)(1).

The Ninth Circuit's conclusion that the "major purpose of the CZMA . . . to avoid conflict and encourage cooperation between the federal and state governments" dictates state application of CZMA programs to OCS leasing decisions is clearly wrong. As the 1978 amendments to the OCSLA show, it is not necessary to adopt a broad construction of Section 307(c)(1) of the CZMA to provide the States with opportunities for consultation concerning the OCS program.

The Ninth Circuit also erred in relying upon 1980 statements of congressional committees as to Section 307 of the CZMA. Since Congress did not amend Section 307 in 1980 (nor even consider doing so), the committees' discussion of the section was wholly gratuitous and received

³⁰ Section 201(f) of the OCSLA, 43 U.S.C. § 1331(f), also reflects the error of the court below. That provision of the statute defines the term "affected state" as one "in which there is a substantial probability of significant impact . . . resulting from the exploration, development, and production of oil and gas anywhere on the [OCS]. . . ." In so qualifying as an "affected state," as opposed to a "directly affect[ed]" state under the CZMA, a State is entitled to submit comments under Section 18 with respect to the five-year leasing schedule and to make recommendations under Section 19 as to the size, timing, or location of a particular lease sale.

no scrutiny on the floor of the House or Senate. Such post-enactment commentary by congressional committees is in no sense "legislative history" as to a prior enactment.²¹ See *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980):

"The less formal types of subsequent legislative history [as opposed to subsequent legislation] provide an extremely hazardous basis for inferring the meaning of a Congressional enactment. . . . Such history does not bear a strong indicia of reliability . . . because as time passes memories fade and a person's perception of his earlier intention may change."²²

This Court's observation in *GTE Sylvania* is particularly appropriate here, since the 1980 committee members who subscribed to the reports did not even purport to follow the intent of their 1972 predecessors. To the contrary, they stated that in 1972 Congress had not made specific provision for state input into OCS leasing decisions. See p. 15 & n.17, *supra*. The Ninth Circuit contradicted *GTE Sylvania*, as well as a host of other decisions of this Court, in placing "substantial weight" (17a) upon the 1980 committee reports.²³

²¹ *United Airlines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977).

²² See also *Bread Political Action Comm. v. FEC*, ____ U.S. ____, 102 S.Ct. 1235, 1237-38 (1982).

²³ See *Weinberger v. Rossi*, ____ U.S. ____, 102 S.Ct. 1510, 1517 (1982); *County of Washington v. Gunther*, 452 U.S. 161, 176 n.16 (1981); *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980); *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132-33 (1974); *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963); *United States v. United Mine Workers*, 330 U.S. 258, 281-82 (1947).

CONCLUSION

For the reasons recited above, this Court should grant a writ of *certiorari* to review the Ninth Circuit's decision. Moreover, petitioners request that the Court set this case for argument at the earliest possible time.²⁴ Such expedition is necessary because the Ninth Circuit's ruling, until reversed by this Court, will pose severe litigation obstacles to the OCS program.

Respectfully submitted,

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**Counsel of Record*

February 8, 1983

²⁴ While not directly applicable to the CZMA claim in this action, Section 23(d) of the OCSLA, 43 U.S.C. § 1349(d), which was designed by Congress to deal with OCS litigation, provides that

"Except as to causes of action which the court considers of greater importance, any action under this section shall take precedence on the docket over all other causes of action and shall be set for hearing at the earliest practical date and expedited in every way."

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

Nos. 81-5699 to 81-5701, 81-5811 to
81-5815, 81-5720 and 81-5822

The STATE OF CALIFORNIA, acting By and Through Governor Edmund G. BROWN, Jr., the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation,
Plaintiffs-Appellees,

v.

James G. WATT, as Secretary of the Interior; the United States Department of the Interior; Edward Hastey, as Acting Director of the United States Bureau of Land Management; Robert Burford, as Director Designate of the United States Bureau of Land Management, in his official capacity as Director when and if assumed; the United States Bureau of Land Management, *Defendants,*

Western Oil and Gas Association, a regional trade association; Amoco Production Company, a corporation; Atlantic Richfield Company, a corporation; Champlin Refining Company, a corporation; Chevron U.S.A. Inc.; Cities Service Company, a corporation; Conoco, Inc.; Elf Aquitaine Oil and Gas, a corporation; Exxon Corporation; Getty Oil Company, a corporation; Gulf Oil Corporation; Phillips Petroleum Company, a corporation; and Shell Oil Company, a corporation, *Defendants-in-Intervention/Appellants.*

NATURAL RESOURCES DEFENSE COUNCIL, INC.;
the Sierra Club; Friends of the Earth; Friends of the Sea

Otter; and the Environmental Coalition on Lease Sale 53,
Plaintiffs-Appellees,

v.

James G. WATT, as Secretary of the
Interior, etc., et al., *Defendants,*
Western Oil and Gas Association, a regional trade association,
etc., et al. *Defendants-in-Intervention/Appellants.*

STATE OF CALIFORNIA, acting By and Through Governor
Edmund G. BROWN, Jr., etc., et al., *Plaintiffs-Appellees.*

County of Humboldt; County of Marin; County Mendocino;
County of Monterey; County of San Luis Obispo; County of San
Mateo; County of Santa Barbara; County of Santa Clara;
County of Sonoma; City and County of San Francisco; City of
Brisbane; City of Capitola; City of Carmel-By-the-Sea; City of
Los Angeles; City of Morro Bay; City of Pismo Beach; City of
San Luis Obispo; City of Santa Barbara; City of Santa Cruz;
City of Santa Monica; City of Seaside; Association of Monterey
Bay Area Governments, *Plaintiffs-in-Intervention/*
Appellees,

v.

James G. WATT, as Secretary of the
Interior, etc., et al.,
Defendants-Appellants.

NATURAL RESOURCES DEFENSE
COUNCIL, INC., etc., et al.,
Plaintiffs,

County of San Diego,
Plaintiff-in-Intervention/Appellant,

v.

James G. WATT, as Secretary of the
Interior, etc., et al.,
Defendants-Appellees,

Western Oil and Gas Association, a
regional trade association, etc., et al.,
Defendants-in-Intervention/Appellees.

NATURAL RESOURCES DEFENSE
COUNCIL, INC., etc., et al.,
Plaintiffs-Appellants,

v.

James G. WATT, as Secretary of the
Interior, etc., et al.,
Defendants-Appellees.

STATE OF CALIFORNIA, acting By and Through Governor
Edmund G. BROWN, Jr., etc., et al., *Plaintiffs,*

County of San Diego,
Plaintiff-in-Intervention/Appellant,

v.

James G. WATT, as Secretary of the
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Defendants-Appellees,

Western Oil and Gas Association, a
regional trade association, etc., et al.,
Defendants-in-Intervention/Appellees.

NATURAL RESOURCES DEFENSE
COUNCIL, INC., etc., et al.,
Plaintiffs,

County of Humboldt, etc., et al.,
Plaintiffs-in-Intervention/Appellants,

v.

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Interior, etc., et al.,
Defendants-Appellees,

Western Oil and Gas Association, a
regional trade association, etc., et al.,
Defendants-in-Intervention/Appellees.

The STATE OF CALIFORNIA, acting By and Through Governor Edmund G. BROWN, Jr., etc., et al., *Plaintiffs-Appellants*,

County of Humboldt, etc., et al.,
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James G. WATT, as Secretary of the
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Defendants-Appellees,

Western Oil and Gas Association, a
regional trade association, etc., et al.,
Defendants-in-Intervention/Appellees.

NATURAL RESOURCES DEFENSE
COUNCIL, INC., etc., et al.,
Plaintiffs-Appellees,

County of Humboldt, etc., et al.,
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v.

James G. WATT, as Secretary of the
Interior; etc., et al.,
Defendants-Appellants.

The STATE OF CALIFORNIA, acting By and Through Governor Edmund G. BROWN, Jr., etc., et al., *Plaintiffs*,

County of Humboldt, etc., et al.,
Plaintiffs-in-Intervention/Appellants,

v.

James G. WATT, as Secretary of the
Interior, etc., et al.,
Defendants-Appellees.

Argued and Submitted Jan. 15, 1982. Decided Aug. 12, 1982.

On cross motions for summary judgment in suit brought by state of California and agencies thereof alleging that federal defendants had violated federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in outer continental shelf, the United States District Court for the Central District of California, Mariana R. Pfaelzer, J., 520 F.Supp. 1359, entered judgment. Appeal was taken. The Court of Appeals, Sneed, Circuit Judge, held that: (1) the Secretary of Interior violated Coastal Zone Management Act by selling oil and gas leases without determination of consistency with state coastal zone management plan; (2) Department of Interior did not violate National Environmental Policy Act by failing to supplement environmental impact statement; (3) Secretary did not violate Outer Continental Shelf Lands Act by refusing to accept recommendations of governor regarding lease sale; and (4) environmental groups had standing to enforce consistency provision of Coastal Zone Management Act.

Affirmed in part, reversed in part, vacated in part and stayed in part.

Theodora Berger, Deputy Atty. Gen., Los Angeles, Cal., for State of Cal.

Donatas Januta, San Francisco, Cal., argued, for Coastal Counties and Cities; Irwin D. Karp, Januta & Karp, San Francisco, Cal., on brief.

Greer Knopf, Deputy County Counsel, San Diego, Cal., for San Diego County.

Trent W. Orr, Natural Resources Defense Council, San Francisco, Cal., argued, for Natural Resources Defense Council; Sarah Chasis, Natural Resources Defense Council, New York City, Julie E. McDonald, Sierra Club Legal Defense Fund, San Francisco, Cal., on brief.

E. Edward Bruce, Covington & Burling, Washington, D.C., for Watt, Western Oil & Gas Ass'n, et al.

Peter R. Steenland, Jr., Atty., Dept. of Justice, Washington, D.C., for U.S.

H. Bartow Farr, III, Joseph N. Onek, Peter E. Scheer, Onek, Klein & Farr, Washington, D.C., for amicus curiae Coastal States Organization.

Appeal from the United States District Court for the Central District of California.

Before SNEED, TANG and PREGERSON, Circuit Judges.

SNEED, Circuit Judge:

This appeal concerns a dispute over the proposed sale by the United States Department of Interior of leases to drill for and extract oil and gas in the outer continental shelf (OCS) off the coast of California.

Plaintiffs below were the State of California and various agencies within the state. Intervening as plaintiffs were various cities and counties in California (hereafter "local governments"). Plaintiffs in a companion case, which was consolidated with this one, were the Natural Resources Defense Council, the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale 53 (hereafter "environmental groups"). Defendants in both cases below were James G. Watt, acting in his official capacity as Secretary of the Interior, the Department of Interior, Robert Burford, acting in his official capacity as Director of the Bureau of Land Management, and the Bureau of Land Management (BLM). Intervening as defendants in both actions were Western Oil and Gas Association (WOGA), a regional trade association of companies and individuals in the petroleum industry, and various oil companies that had submitted high bids on one or more tracts offered in Lease Sale No. 53.

Plaintiffs claimed below that defendants violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin. Finding that there were no genuine issues of material fact in the two consolidated cases, the district court granted summary judgment

to the plaintiffs on their claim based on the Coastal Zone Management Act (CZMA), granted summary judgment to defendants on the remaining issues, and dismissed the claims of the environmental groups for lack of standing. The court enjoined leasing of the disputed tracts and ordered the bids and deposits returned but stayed the effect of the latter order pending appeal.¹ All parties appealed. We affirm in part, reverse in part, vacate in part, and stay in part.

¹ The district court order reads as follows:

"ORDER AND SUMMARY JUDGMENT

The parties' cross-motions for summary judgment, pursuant to Fed.R.Civ.P. 56, and defendant-intervenors' motion for summary judgment, or, in the alternative, motion to dismiss the complaints of Natural Resources Defense Council, *et al.*, and of the County of Humboldt, *et al.*, pursuant to Fed.R.Civ.P. 12(b)(6), came on for hearing before the Honorable Mariana R. Pfaelzer on July 10, 1981. All parties appeared by and through their respective counsel of record. Having reviewed and considered the administrative record and the memoranda, affidavits, and exhibits filed by the parties, and having heard and considered the oral arguments of counsel, and having taken the matter under submission, the Court has incorporated its Findings of Fact and Conclusions of Law in the Opinion filed herewith. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' Motion for Summary Judgment in CV 81-2080, with respect to the claim arising under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*, is granted. Defendants' Motion for Summary Judgment with respect to plaintiffs' claim arising under the Coastal Zone Management Act is denied.

2. Defendants' decision to lease Tracts 129 to 142, 144 to 146, 148 to 155 and 158 to 161 in the northern portion of the Santa Maria Basin for oil and gas development was made in violation of the Coastal Zone Management Act.

3. Any bids received for the tracts at issue are declared null and void and the monies posted shall be returned to the bidders.

4. Any oil and gas leases for any of the tracts at issue herein awarded as part of Lease Sale No. 53 are declared null and void.

I.

ISSUES ON APPEAL

There are four issues on appeal which we state as follows:

1. CZMA Issue: Did the Secretary of Interior violate Section 307(c)(1) of the CZMA by selling oil and gas leases for the

5. Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan.

6. Defendant's Motion for Summary Judgment in CV 81-2080 with respect to plaintiffs' claims arising under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*, the National Environmental Protection Act, 42 U.S.C. §§ 4231 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, is granted. Plaintiffs' Motion for Summary Judgment in CV 81-2080 with respect to the claims arising under these statutes is denied.

7. Defendant-intervenors' Motion to Dismiss Plaintiffs, Natural Resources Defense Council, *et al.*, in CV 81-2081 pursuant to Fed.R. Civ.P. 12(b)(6) is granted.

8. Defendant-intervenors' Motion to Dismiss Plaintiff-intervenors County of Humboldt, *et al.*, in CV 81-2080 pursuant to Fed.R.Civ.P. 12(b)(6) is denied.

9. Each Party shall bear its own costs.

10. Judgment is hereby entered.

The Court shall retain continuing jurisdiction over this case to ensure compliance with this Order."

California v. Watt, 520 F.Supp. 1359, 1389 (C.D.Cal.1981).

outer continental shelf without a determination of consistency with California's coastal zone management plan? Our answer is that he did.

2. NEPA Issue: Did the Department of Interior violate the National Environmental Policy Act (NEPA) by failing to supplement the Environmental Impact Statement? Our answer is that it did not.

3. OCSLA Issue: Did the Secretary violate section 19 of the Outer Continental Shelf Lands Act (OCSLA) by refusing to accept the recommendations of the Governor of the State of California regarding Lease Sale 53? Our answer is that he did not.

4. Standing Issue: Do the environmental groups have standing to enforce the consistency determination provision of the CZMA? Our answer is that they do.

II.

STANDARD OF REVIEW

As already noted, summary judgment was granted by the district court on all issues. Our review is identical to that of the district court. *Washington ex rel. Edwards v. Heimann*, 633 F.2d 886, 888 n.1 (9th Cir. 1980). That is, we may affirm a summary judgment only if, viewing the evidence in the light most favorable to the party against whom it is granted, we find no genuine issue of material fact, and we find that the prevailing party is clearly entitled to judgment as a matter of law. *Id.* at 888; *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1300 (9th Cir. 1981).

III.

FACTS AND BACKGROUND

While the facts and background of these cases are complex, they are thoroughly laid out in the district court opinion. *California v. Watt*, 520 F.Supp. 1359, 1365-68 (C.D.Cal. 1981). To

aid the reader of this opinion, however, we shall summarize briefly the pertinent facts and background of these cases.

The lease sale in dispute is Lease Sale 53, consisting of a maximum offering of 243 designated tracts of the OCS for mineral development. The tracts in Lease Sale 53 lie in five different basins off the coast of California, including the Santa Maria Basin. That basin extends generally from Point Sur in Monterey County in the north to Point Conception in Santa Barbara County in the south. During the course of decision-making on Lease Sale 53, the Department of Interior at various times proposed leasing within the Santa Maria Basin only and at other times within all five of the basins originally included.

In November 1977, BLM issued a Call for Nominations for Lease Sale 53. The Call requested the petroleum industry to designate specific tracts on which it was interested in bidding if a sale were held. It also asked federal, state, and local governments, universities, environmental organizations, research institutions, and the public to identify specific tracts that they believed should be excluded from leasing or should be leased under particular restrictions due to conflicting resource values or environmental factors. In October 1978 the Department of Interior announced the tentative tract selection for Lease Sale 53. The Santa Maria Basin contained 115 of the 243 tracts involved in the sale.

A draft Environmental Impact Statement (EIS) was released for public comment in April 1980. The draft EIS, which analyzed the environmental impacts in the five basins to be included in Lease Sale 53, was based on a reserve estimate of 404 million barrels of oil for the Santa Maria Basin.

In September, 1980, a final EIS was released. Shortly before its publication, on or about August 28, 1980, the United States Geological Survey made available revised reserve estimates for the Santa Maria Basin in the amount of 794 million barrels of oil. The revised estimate was incorporated in an addendum to the EIS. A Secretary Issue Document (SID), an internal docu-

ment intended to aid the Secretary in making decisions concerning lease sales, was released in October 1980. The SID concerned the potential impact of Lease Sale 53 on the environment, and concluded that a supplemental EIS was not needed.

On July 6, 1980, the California Coastal Commission requested that the Secretary submit a consistency determination at the time of the issuance of the proposed notice of sale. On October 16, 1980, the former Secretary of the Interior, Cecil D. Andrus, issued the proposed notice of sale for Lease Sale 53. The notice proposed leasing only within the Santa Maria Basin, the four other basins being deleted from the proposed sale. By letter of October 22, 1980, the Department of Interior notified the California Coastal Commission (CCC) of its "negative determination," to the effect that the preleasing activities associated with Lease Sale 53 would have no "direct effects" on California's coastal zone, and that as a consequence no consistency determination was necessary. In response to this negative determination, on December 16, 1980, the CCC adopted a resolution that the deletion of 29 tracts in the northern portion of the Santa Maria Basin was necessary in order for Lease Sale 53 to be consistent with the California Coastal Management Plan. On December 24, 1980, Governor Edmund G. Brown, Jr. of California, responding to Secretary Andrus' proposed notice of sale, recommended the deletion of 32 tracts located in the northern portion of the Santa Maria Basin.

The new Secretary of Interior, James G. Watt, issued a revised proposed notice of sale for Lease Sale 53 on February 10, 1981. The four basins previously deleted from the proposed sale by former Secretary Andrus were once more included in the sale. The revised notice continued to propose leasing in the Santa Maria Basin. In transmitting the revised proposal to Governor Brown, Secretary Watt requested recommendations pursuant to section 19 of the OCSLA, 43 U.S.C. § 1345. By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning the revised Lease Sale 53. He reiterated his position that, based upon the balancing test of section 19, the northern 32 tracts in the Santa Maria Basin

should be deleted from the sale. Enclosed with the letter detailing Governor Brown's recommendations were comments and recommendations from various state agencies and local governments in California.

On April 10, 1981, the Department of Interior issued a news release in which Secretary Watt announced that he planned to divide Lease Sale 53 into two sales, with the sale of the tracts in the Santa Maria Basin to be held in May 1981 and the sale of the remaining tracts to be postponed. The Secretary stated that his decision to lease the entire Santa Maria Basin was based on a finding of overriding national interest. The final notice of sale for Lease Sale 53, Santa Maria Basin, was published on April 27, 1981.

By letter dated May 1, 1981, Secretary Watt notified Governor Brown of the rejection of California's recommendations concerning the lease sale in the Santa Maria Basin, and provided a brief explanation of the basis for the rejection.

On April 29, 1981, California sought an injunction in district court against the lease sale. The court, although it allowed bids on the tracts to be received and opened, on May 27, 1981, granted a preliminary injunction which prevents the Department of Interior from accepting or rejecting the bids or issuing leases on the disputed tracts. California and the local governments moved for summary judgment on their claim that Lease Sale 53 violated numerous statutes. Secretary Watt and the other federal defendants cross-claimed for summary judgment on the same issues. The response of the district court to these motions has already been indicated.

We find that no genuine issue of material fact exists. The questions before us, therefore, are whether the parties prevailing below are clearly entitled to their judgments as a matter of law. We now turn to the four legal issues with which this appeal is concerned.

IV.

COASTAL ZONE MANAGEMENT ACT

This issue concerns the application of CZMA Section 307(c)(1), 16 U.S.C. § 1456(c)(1), to the lease sale stage of outer continental shelf (OCS) oil, gas, and mineral development. Section 307(c)(1) reads:

Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs.

While it is conceded on appeal that this section does apply at the lease sale stage, the parties vigorously dispute whether Lease Sale 53 would have "direct effects" on California's coastal zone.

We hold that Lease Sale 53 would "directly affect" the state's coastal zone. The district court so held and we agree. The federal appellants and oil companies (hereafter collectively referred to as "federal appellants") propose a definition of "directly affecting" that limits the scope of direct effects from a lease sale to those effects that "are part of, or immediately authorized by, a lease sale." *See Brief For The Federal Appellants at 21-22; Brief of Appellants Western Oil & Gas Association at 27.* Subsequent steps such as the promulgation of exploration or development plans are not direct effects of the lease sale, their argument runs, because separate consistency determinations are required at each of these later stages. It follows that a lease sale has no direct effects upon the coastal zone; such direct effects as there may be affect things other than the coastal zone. This definition and reasoning underlies the Secretary of Interior's determination that no consistency determination is required.

California, the local governments, and the amici curiae environmental groups (hereafter collectively referred to as "California") propose a broader definition of "directly affecting," encompassing effects of the lease sale that the lessor "reasonably anticipates." Another formulation of this definition is that

any activity having a functional interrelationship from an economic, geographic, or social standpoint with lands and waters in the coastal zone directly affects the coastal zone. The district court adopted this broad definition, holding that the federal appellants "cannot deny that leasing activities have consequences in the coastal zone by pointing to a series of events which occur after the leases are issued, but before the actual effects are realized." *California v. Watt*, *supra*, 520 F.Supp. at 1379-80.

We agree that the lease sale in this case directly affects the coastal zone. These direct effects of Lease Sale 53 on California's coastal zone are detailed by the district court. *Id.* at 1371, 1380-82. We need not repeat them here. It is enough to point out that decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction. *Id.*

Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(3). The narrow definition of "directly affecting" urged upon us by the federal appellants would diminish the ability of the state to protect its coastal zone and to influence activities that were set in motion at the lease sale stage.

A. Purpose Of The CZMA

This diminution would not be consistent with the purposes of the CZMA, which was enacted to promote the preservation of natural resources in the coastal zone. 16 U.S.C. § 1452(1). Under the Act, each coastal state has primary authority over the lands and waters within its three-mile coastal zone, to be exercised "in cooperation with Federal and local governments and other vitally affected interests." 16 U.S.C. § 1451(i).

A key element in the CZMA's comprehensive plan is the voluntary adoption by each coastal state of a federally-approved coastal zone management plan, which must adequately consider the "national interest" and "the views of Federal agencies principally affected by such program." 16 U.S.C. §§ 1455(c)(8), 1456(b). The Act requires the state's plan to include a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for *anticipating and managing* impacts from such facilities." 16 U.S.C. § 1454(b)(8) (emphasis added). A quid pro quo for the state's development of such a plan is that certain federal activities will be conducted consistently with the state's plan. 16 U.S.C. § 1456(c).

Thus, a major purpose of the CZMA is to avoid conflict and encourage cooperation between the federal and state governments in developing a comprehensive plan for long-term management of the resources in the coastal zone. 16 U.S.C. §§ 1451, 1452. To effectuate this purpose, the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone. The narrow definition urged upon us by the federal appellants would preclude this early involvement.

B. Legislative History

Our approach is not inconsistent with the legislative history of the CZMA. Although, as the district court pointed out, the legislative history of this Act is "inconclusive," 520 F.Supp. at

1371, it does lend support, when considered as a whole, to our approach.

In 1972, the Conference Committee substituted the phrase "directly affecting the coastal zone" for "in the coastal zone," in an apparent attempt to expand the scope of the provision. See *id.* No clue is given in 1972 as to how "directly" was to be interpreted. In 1976, in conjunction with amendments to CZMA sections other than 307(c)(1), the Senate Report noted:

There is very little coordination or communication between Federal agencies and the affected coastal States prior to major energy resource development decisions, such as the decision to lease large tracts of the OCS for oil and gas.

. . . Full implementation of the Coastal Zone Management Act of 1972 . . . could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act.

S.Rep. No. 277, 94th Cong., 2d Sess. 3, *reprinted in* 1976 U.S.Code Cong. & Ad.News, 1768, 1770.

In the Coastal Zone Management Improvement Act of 1980, Pub.L. No. 96-464, 94 Stat. 2060 (1980), Congress did not amend the section 307(c)(1) consistency provisions, but the reports of both the Senate and House Committees support a broad interpretation of "directly affecting." See 520 F.Supp. at 1372-73. The Senate report stated that:

intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone.

S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980). (Emphasis added). The House Committee specifically addressed the uncertainty that had arisen concerning the interpretation of the threshold test of "directly affecting" the coastal zone. H.R.Rep. No. 1012, 96th Cong., 2d Sess. 34-35, *reprinted in* 1980 U.S.Code Cong. & Ad.News 4382-83. The Committee offered two alternative definitions of the phrase "directly

affecting:" (1) The threshold test applies "whenever a Federal activity [has] a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies." *Id.* at 34, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4382. (2) The Federal consistency requirements should apply "when a Federal agency initiates a series of events of coastal management consequence." *Id.* The House indicated its support of an "expansive interpretation of the threshold test," *id.* at 35, *reprinted in* 1980 U.S.Code Cong. & Ad.News at 4383, and reiterated the Senate's statement that consultation between federal and state agencies should occur "at the earliest practicable time." *Id.* at 34, U.S.Code Cong. & Ad.News at 4382; *see also* S.Rep. No. 783, *supra*.

We recognize that these post-enactment committee statements might not represent a view adopted by Congress after full deliberation and, in any event, are not conclusive. However, these statements must be given appropriate weight. *See Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8, 100 S.Ct. 1932, 1938 n.8, 64 L.Ed.2d 593 (1980); *Walt Disney Productions v. United States*, 480 F.2d 66, 68 (9th Cir. 1973), *cert. denied*, 415 U.S. 934, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974). In the circumstances of this case we accord them substantial weight because they appear to us to serve better the purposes of the CZMA than would the narrower interpretation urged by the federal appellants.

C. National Oceanic And Atmospheric Administration's Interpretation

Our approach does no violence to our obligation to pay deference to the appropriate agency's interpretation of section 307(c)(1). The National Oceanic and Atmospheric Administration (NOAA) is the agency within the Department of Commerce charged with the responsibility of promulgating regulations for the CZMA. *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 908 (C.D.Cal. 1978), *aff'd*, 609 F.2d 1306 (9th

Cir. 1979). Its current view of the definition of "directly affecting" is unclear.

Until May 1981, NOAA consistently took the position that pre-leasing activities were subject to consistency review, and favored a broad interpretation of "directly affecting." *See Watt v. California, supra*, 520 F.Supp. at 1376-77. In 1978, NOAA stated that section 307(c)(1) was intended to apply to "all Federal actions which were *capable of significantly affecting* the coastal zone." 43 Fed.Reg. 10,510-11 (1978) (emphasis added). Although NOAA deleted this definition in 1979 in response to a Department of Justice opinion taking issue with that portion of the definition, 44 Fed.Reg. 37,142 (1979), it reiterated the view that "Federal agencies are encouraged to construe liberally the 'directly affecting' test in borderline cases so as to favor inclusion of Federal activities subject to consistency review." 44 Fed.Reg. 37,146-47 (1979). Along the same lines in 1980, NOAA noted:

In our view Federal consistency requirements subject final notices of OCS sales to consistency determinations. This critical decision point in the OCS process influences tracts to be selected and stipulations to be imposed and thus sets in motion actions which will *invariably* affect coastal resources.

Letter from NOAA to State Coastal Management Program Directors (April 9, 1980) (emphasis added).

In May 1981, shortly after complaints were filed in the present case, NOAA filed a notice of proposed rulemaking defining "directly affecting" in a way more nearly consistent with, if not identical to, that urged on us by the appellants. 46 Fed.Reg. 26,658-59 (1981). According to the definition, a federal activity directly affects the coastal zone only:

if the Federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or that the activity initiates a chain of events

reasonably certain to result in such alteration, *without further required agency approval.*

Id. (emphasis added). In the comments to this notice, NOAA listed lease issuance as an example of an activity that would not be subject to a consistency determination because it does not directly affect the coastal zone. *Id.* at 26,660. On July 2, 1981, NOAA issued its notice of final rulemaking. In late July and early August, however, resolutions were introduced in both houses of Congress disapproving the new regulations. *Cf.* 16 U.S.C. § 1463a. After the district court decision in this case, and following a vote by the House Merchant Marine and Fisheries Committee to disapprove the regulations on October 16, 1981, NOAA suspended the effective date of the regulations and moved to withdraw them, explicitly acknowledging the negative reaction it had received from both Congress and the coastal states. 46 Fed.Reg. 50,937, 50,976 (1981).

An agency's interpretation of a statute, while not having the force of law, is entitled to deference if we can conclude that the regulation "implement[s] the congressional mandate in some reasonable manner." *United States v. Vogel Fertilizer Co.*, ___ U.S. ___, 102 S.Ct. 821, 827, 70 L.Ed.2d 792 (1982), quoting *United States v. Correll*, 389 U.S. 299, 307, 88 S.Ct. 445, 449, 19 L.Ed.2d 537 (1967); *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 672 F.2d 732, at 734-735 (9th Cir. 1982). This general principle of deference, while fundamental, only sets the framework for judicial analysis, *United States v. Vogel Fertilizer Co.*, *supra*, 102 S.Ct. at 827, quoting *United States v. Cartwright*, 411 U.S. 546, 550, 93 S.Ct. 1713, 1716, 36 L.Ed.2d 528 (1973), and poses no obstacle in this case to our rejection of appellants' approach.

As indicated, NOAA's short-lived narrow definition of "directly affecting" was first proposed during the pendency of this litigation, was specifically disapproved by some members and at least one Committee of Congress, was contrary to NOAA's long-standing position on the matter, and may not reflect NOAA's present view. To defer to such a passing phase in the appropriate agency's interpretation would amount to

obedience to shadows and a flight from judicial responsibility. On the other hand, we acknowledge that NOAA's earlier view that "directly affecting" should be liberally construed provides support to our holding that Lease Sale 53 must be accompanied by a section 307(c)(1) consistency determination.

D. Consistency With Outer Continental Shelf Lands Act

The federal appellants also claim that a definition of "directly affecting," other than one substantially similar to NOAA's aborted narrow view, is inconsistent with section 19 of the OCSLA. This section provides for Department of Interior consideration of state governors' recommendations regarding "size, timing, or location" of lease sales. We acknowledge, as we must, that federal statutes should be construed in a consistent and harmonious manner. Only in this way can congressional intent be given its fullest expression. *Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726, 729 (9th Cir. 1978).

We find no conflict between our holding with respect to the scope of "directly affecting" as applicable to the facts of this case and the functions and purposes of the OCSLA. The CZMA and the OCSLA focus on different concerns—the OCSLA on development of oil and gas resources, and the CZMA on environmental concerns. *American Petroleum Institute v. Knecht*, *supra*, 456 F.Supp. at 919. They impose on the federal government separate obligations owing to different parties, and are capable of co-existence. Their consistency is further supported by the "savings clause" in the OCSLA, which expressly provides: "[N]othing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972." 43 U.S.C. § 1866. We, therefore, conclude that Lease Sale 53 cannot proceed until the Secretary of Interior makes a determination that the proposed lease is consistent, to the maximum extent practicable, with the California coastal zone management plan.

E. Placement Of Final Authority To Determine That The OCS Lease Sale 53 Is Consistent To The Maximum Extent Practicable

To hold that the Secretary of Interior is required by CZMA § 307(c)(1) to make a consistency determination before going ahead with Lease Sale 53 unavoidably raises additional issues. Foremost among these is whether consistency to the maximum extent practicable of the federal activity with the approved state management program means simply conformity to the program in the manner deemed appropriate by the state concerned. The federal appellants insist that the district court, in effect, so held by enjoining the lease sale "until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." 520 F.Supp. at 1389.

Assuming *arguendo* that the district court did so hold, we here reject that interpretation of the CZMA. The statute does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is *possible*. It only provides that the activity be consistent *to the maximum extent practicable*. The Act is not explicit with respect to the location of final authority to determine whether the required consistency exists. We believe such authority must reside in the Executive Branch of the federal government subject, of course, to such judicial review as is appropriate. To hold otherwise on the basis of silence, or at best attenuated inferences drawn from the language of Congress, weighs too lightly the interests of the Nation against that of a state.

Our conclusion is supported by the language and structure of both the CZMA and the OCSLA, as well as the history of events leading to the enactment of the OCSLA.

1. CZMA.

With respect to any plan for the exploration, development, and production stages, section 307(c)(3) of the CZMA sets out an elaborate procedure for dealing with disagreements between a coastal state and an applicant for a federal license or permit to conduct an activity affecting the coastal zone concerning the consistency of the federal activities and the state's management program. Under this section, to obtain a federal license or permit the state must certify that the activity is consistent unless the Secretary of Commerce properly finds that the activity "*is consistent with the objectives of this chapter or is otherwise necessary in the interest of national security.*" 16 U.S.C. § 1456(c)(3)(A)-(B) (emphasis added). This provision clearly precludes an irreversible state veto of OCS activity at the exploration, development, and production stages. The Secretary of Commerce is given the final say as to whether the activity is consistent with the objectives of the CZMA, and if not, whether it is otherwise necessary in the interest of national security. It would be anomalous for Congress to have provided the state with final authority unilaterally to nip these activities in the bud, by reason of the application of section 307(c)(1) to lease sales, in the face of its careful scheme in section 307(c)(3) to assure that a state cannot unilaterally stop the activity at later stages. We do not think it intended to so provide.

2. OCS History And The OCSLA.

The history of the dispute concerning offshore resources supports our conclusion that a conclusive state veto was never intended over OCS oil and gas development. In 1953, to settle the long-standing dispute between the federal government and coastal states concerning control over offshore areas, Congress enacted the Submerged Lands Act, 43 U.S.C. §§ 1301-43. This "1953 Compromise" of the so-called Tidelands Oil Issue granted coastal states "title to and ownership of" submerged lands within three miles of the coast, the area referred to as the "coastal zone." 43 U.S.C. §§ 1301(a), 1311(a). The

federal government was given exclusive proprietary control over "the soil and seabed of the Continental Shelf" outside this three-mile zone. 43 U.S.C. §§ 1302, 1332(a). The CZMA was not intended to change this division of control. Section 307(e) of the CZMA provides that:

Nothing in this title shall be construed—

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters.

16 U.S.C. § 1456(e). *See also*, H.R. Conf. Rep. No. 1544, 92d Cong., 2d Sess. 7, 12 (1972).

Granting final veto power to coastal states would thwart the purposes of the OCSLA. As the Supreme Court has recently stated, "Congress primarily was concerned in enacting OCSLA to assure federal control over the Shelf and its resources." *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 2877, 69 L.Ed.2d 784 (1981). In 1978, in response to concern over increased dependence on foreign oil, the OCSLA was amended to:

establish policies and procedures for managing the oil and natural gas resources of the [OCS] which are intended to result in expedited exploration and development of the [OCS] in order to achieve national economic and energy policy goals, assure national security, reduce dependence on foreign sources, and maintain a favorable balance of payments in world trade.

43 U.S.C. § 1802(1). These are vitally important goals for the well-being of the country, and the ultimate management authority over their achievement is vested in the federal government and not a particular coastal state.

Section 19 of the OCSLA, 43 U.S.C. § 1345, it is true, instructs the Secretary of Interior to consider recommendations by the Governor of an affected state regarding the size, timing, or location of a proposed lease sale. 43 U.S.C. § 1345(a). The section gives great weight to the Governor's

recommendations, providing that the Secretary of Interior "shall accept" them if they provide a reasonable balance between the national interest and the well-being of the citizens of the state. Nevertheless, it is explicitly provided that the Secretary's decision to reject such recommendation is final, unless his decision is arbitrary or capricious. 43 U.S.C. § 1345(c), (d). The finality of the Secretary of Interior's decision under this section is another strong indication that the federal government is intended to have the ultimate authority over the OCS leasing program.

We, therefore, interpret section 307(c)(1) to require that Lease Sale 53 be made consistent with California's plan to the maximum extent practicable. Accommodation to California's plan to a lesser extent does not afford consistency *to the maximum extent practicable*. Accommodation to a greater extent exceeds the command of the statute. In making this consistency determination, the Secretary of Interior may take into account that further consistency determinations will be made at the exploration, development, and production stages, when more complete information will be available. See 16 U.S.C. § 1456(c)(3). In other words, the lease sale need not be configured so as to preclude *any* possible future inconsistency from arising as development proceeds. The Secretary of Interior, however, must set the leasing, development, and production activities on a path that is consistent with the state plan to the maximum extent practicable in light of the then available knowledge.

The limit beyond which conformity with a state plan would not be practicable to the maximum extent cannot be precisely delineated. Such factors as the extent to which leasing, exploration, development, drilling, and production would be hampered or proscribed by conformity; the reasonableness of the state plan; as well as the terms of the particular proposed lease sale must be examined. Beyond this it is difficult to go: verbal formulas cannot eliminate the necessity of examining each situation with care and sensitivity to the concerns of the state and the nation.

3. Settlement Of Disputes As To Consistency By Secretary Of Commerce.

Inasmuch as the Secretary of Interior has not yet made the consistency determination that we hold he must with respect to Lease Sale 53, it is not possible to know whether the Secretary of Interior and the State of California will disagree on whether the required consistency determination reflects consistency "to the maximum extent practicable." In making the consistency determination, the Secretary of Interior undoubtedly will be guided by a spirit of federal/state cooperation. Should the state disagree with the Secretary's consistency determination, sections 307(c) and (h) contain mediation procedures that may be invoked by the Secretary of Commerce to reconcile the paramountcy of the national interest with the concerns of the state. We do not regard subsection (c)(1) of section 307 as lacking, or existing independently of, those procedures explicitly set forth in subsections (c)(3) and (h).

F. Remedy

As already indicated, the district court's order required the federal appellants to conduct "all activities on [the tracts at issue] in a manner consistent with California's Coastal Management Plan." 520 F.Supp. at 1389. The premise on which this order rests appears to be that California's view of consistency ultimately will be controlling. We do not agree with this premise. We, therefore, affirm only that portion of paragraph 5 of the district court's order that requires a consistency determination to be made before Lease Sale 53 goes forward. That is, paragraph 5 is affirmed insofar as it reads:

Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue

We modify that paragraph to delete the remainder, which provides as follows: "and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan." If the State does not agree with a determination of consistency by the Secretary of Interior, the dispute-resolution procedures of the CZMA are available.²

The district court also voided the bids for the tracts at issue and ordered the deposits returned to the bidders. *Id.* The federal appellants and oil companies argue that the cancellation of bids after their contents have been revealed is excessive, punitive, unprecedented, and destroys the essence of secret bidding procedures, thus causing the loss of millions of dollars the bidders spent compiling the data for the bids.³ They argue that such drastic measures should be deferred at least until it is finally decided whether Lease Sale 58 can go forward in its present form. We agree. The resolution of the dispute must await a consistency determination by the Secretary of Interior. If the state does not agree with this determination, final resolution of the conflict must await the outcome of the CZMA dispute resolution procedures. During the pendency of these procedures, the status quo should be maintained. Therefore, we stay the portion of the district court's order (*i.e.*, paragraphs 3 and 4) requiring the cancellation of the bids and return of the deposits and that portion of paragraph 5 of the

² Appellants also object to the district court's failure to perform a "particularized analysis" of possible remedies and their consequences, as required by *Alaska v. Andrus*, 580 F.2d 465 (D.C.Cir.), *vacated in part on other grounds*, 439 U.S. 922, 99 S.Ct. 303, 58 L.Ed.2d 315 (1978). Although this claim appears to have merit, we do not reach the issue of the applicability of *Alaska v. Andrus*, in view of our disposition on other grounds of the remedy ordered below.

³ WOGA concedes that it suggested to the lower court the very remedy to which it now objects, but this does not affect our decision on this issue.

order which required that federal lease sale activities be conducted consistently with California's coastal zone management plan.

To the extent that the deleted portion of paragraph 5 also requires that all other activities, including exploration, development, or production, be conducted consistently with California's plan, it embraces activities and stages of off-shore oil development not at issue in this case. Only the lease sale is at issue. We therefore vacate the district court's order insofar as it extends beyond the lease sale stage.

Finally, we retain jurisdiction over this appeal, and if the consistency determination process is not completed within a reasonable time we will entertain a motion to vacate our stay.

On the CZMA issue, therefore, we hold as follows:

(1) We affirm the district court's order insofar as it requires a consistency determination for Lease Sale 53.

(2) We stay the district court's order insofar as it declares bids and leases null and void and requires return of monies posted and insofar as it requires federal lease sale activities to be conducted consistently with California's coastal zone management plan.

(3) We vacate the district court's order insofar as it applies beyond the lease sale stage.

V.

NATIONAL ENVIRONMENTAL POLICY ACT

California also sought to enjoin the lease sale on the basis of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4331 *et seq.* It contends that the federal government's failure to supplement the Environmental Impact Statement (EIS) to incorporate the latest estimates of oil and gas reserves in the basin was a violation of section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C). That section requires that an EIS be prepared and circulated for major federal actions affecting the quality of the human environment.

The Bureau of Land Management (BLM) released the final EIS on Lease Sale No. 53 in early September, 1980, incorporating the original estimates of oil and gas reserves provided by the United States Geological Survey (USGS). A few days before the release of the EIS, on August 28, 1980, the USGS released revised estimates of the oil and gas reserves. These new figures indicated that the reserves were thought to be roughly twice those originally estimated. Although the BLM did not alter the body of the EIS to reflect the new figures, it did attach the new estimates to the EIS as an Addendum. Also, a Secretary Issue Document (SID) was prepared for the Secretary of Interior in October, 1980, containing revised estimates of the environmental impacts using the new data. It was concluded in the SID, which is a public document, that a supplement to the EIS was not needed.

The district court granted summary judgment to the federal government on this issue, holding that:

the decision of the Department of Interior not to file a supplement or to revise the existing EIS in the few days remaining before publication is not unreasonable.

520 F.Supp. at 1383. We affirm.

The district court in its analysis focused on the adequacy of the initial EIS. 520 F.Supp. at 1382, *quoting Columbia Basin Land Protection Ass'n v. Schlesinger*, 643 F.2d 585, 592 (9th Cir. 1981). While we agree that the initial EIS was adequate, new information may require its supplementation. *Warm Springs Dam Task Force v. Gribble*, 621 F.2d 1017 (9th Cir. 1980). A federal agency has a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions, even after release of an EIS. *Id.* at 1023-24. Guidelines of the Council on Environmental Quality require that agencies:

- (1) Shall prepare supplements to either draft or final environmental impact statements if:

* * *

- (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

40 C.F.R. § 1502.9(c).

An agency's decision not to supplement an EIS will be upheld if it was reasonable. *Warm Springs Dam, supra*, at 1024. Reasonableness depends on the environmental significance of the new information, the probable accuracy of the information, the degree of care with which the agency considered the information and evaluated its impact, and the degree to which the agency supported its decision not to supplement with a statement of explanation or additional data. *Id.* We hold that the decision of the BLM not to supplement the EIS for Lease Sale 53 was not unreasonable.

Whether the revisions to the estimates of oil reserves will change the environmental impact of Lease Sale 53 significantly is problematic. The accuracy of the data is open to question, given the inherently speculative nature of oil reserve estimates. Also, the qualitative impacts on the environment possibly could be the same under either set of estimates. In fact, in the SID only a small quantitative increase in impact was estimated. We acknowledge being influenced by the fact that additional Environmental Impact Statements will be required at the later exploration, production, and development stages, and these will, of course, be based on the latest reserve estimates available at the time they are prepared.

The revised estimates of oil and gas reserves were made available to the public as an addendum to the EIS, and environmental impact estimates using the new data were made public in the SID. While a SID cannot substitute for a supplemental EIS, in this case it supports a holding that the Department of Interior carefully considered the information and its impact before concluding that a supplementary EIS was unnecessary. The SID also provides a detailed explanation for the Secretary of Interior's decision not to supplement. While the Addendum and SID did not go through the public comment process, that process is not essential every time new information comes to

light after an EIS is prepared. Were we to hold otherwise, the threshold decision not to supplement an EIS would become as burdensome as preparing the supplemental EIS itself, and the continuing duty to gather and evaluate new information, *Warm Springs Dam*, *supra*, at 1023, could prolong NEPA review beyond reasonable limits.

The district court did not err in its conclusion with respect to the NEPA issue.

VI.

OUTER CONTINENTAL SHELF LANDS ACT

Section 19 of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1345, provides, as already noted, that the governor of an affected state may submit recommendations to the Secretary of Interior regarding the size, timing, or location of a proposed lease sale. 43 U.S.C. § 1345(a). The Secretary is required to accept the governor's recommendations "if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. § 1345(c). The statute provides that the Secretary's acceptance or rejection of such recommendations shall be final, "unless found to be arbitrary or capricious." 43 U.S.C. § 1345(d). *See, e.g., Ethyl Corp. v. EPA*, 176 U.S.App.D.C. 373, 541 F.2d 1 (D.C. Cir. 1976).

California claims that Governor Brown's recommendations provided for a reasonable balance between national and state interests, and thus that the Secretary's failure to accept the Governor's recommendations was arbitrary and capricious. California also contends that the Secretary violated certain procedural requirements of Section 19.

As the district court properly noted, the scope of our review is limited. In determining whether the Secretary's rejection of the Governor's recommendations was arbitrary or capricious, we must consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*,

401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971), quoted in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974); *Washington State Farm Bureau v. Marshall*, 625 F.2d 296, 302 (9th Cir. 1980). Additionally, we must consider whether the Secretary "articulate[d] a rational connection between the facts found and the choice made," *Bowman Transportation, Inc.*, *supra*, 419 U.S. at 285, 95 S.Ct. at 441, and whether the Secretary made the decision in accordance with his duty under law. *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 904-05, *aff'd*, 609 F.2d 1306 (9th Cir. 1979). The court may not substitute its judgment for that of the agency.

The district court, while not impressed with the spirit with which the Secretary dealt with the Section 19 requirements, held that, giving due deference to his judgment, the Secretary's decision to reject Governor Brown's recommendations was not legally "arbitrary and capricious." 520 F.Supp. 1385-86. We agree.

The Secretary did analyze factors weighing in the balance of interests, and described this analysis in a letter mailed to Governor Brown on May 1, 1981. As the district court noted, the OCSLA provides little or no guidance as to the proper basis for the Secretary's evaluation of a governor's recommendation. It provides that the Secretary must determine whether the governor's recommendation draws a "reasonable balance" between two key factors—the "national interest" and the "well-being of the citizens of the affected State." 43 U.S.C. § 1345(c). The statute requires that the determination of the "national interest" encompass "the desirability of obtaining oil and gas supplies in a balanced manner," but does not attempt to define the factors relevant to the citizens' well-being. *Id.*

The Secretary evaluated such "quantifiable factors" as income from resource development and expected monetary losses due to oil spills, and such "not quantifiable" factors as damage to wildlife, decline in water quality, and "aesthetic and

lifestyle losses." 520 F.Supp. 1384. We agree with the district court that the Secretary gave some consideration to the relevant factors and his decision cannot be said to be arbitrary or capricious.

California also claims that the Secretary failed to comply with the procedural requirements of Section 19 by not providing sufficient opportunity for the Governor to consult and by not adequately communicating to the Governor in writing his reasons for rejecting the recommendation. 43 U.S.C. § 1345(c).

The statute requires that the Secretary in making the decision to accept or reject the recommendation provide the Governor "the *opportunity* for consultation." 43 U.S.C. § 1345(c) (emphasis added). We agree with the district court that the Secretary's consultation with Governor Brown was adequate to meet the technical requirements of the statute. 520 F.Supp. 1385. The statute also requires the Secretary to "communicate to the Governor, in writing, the reasons for his determination to accept or reject such Governor's recommendations." 43 U.S.C. § 1345(c). We also agree with the court below that the Secretary's explanatory letter to the Governor satisfied this requirement, and that the timing of the letter—after announcement of his decision to go ahead with the lease sale and two days after suit was filed on this matter in district court—does not render it ineffective in fulfilling the statutory requirement. 520 F.Supp. 1385.

Having concluded that the Secretary complied with the procedural requirements of Section 19 of the OCSLA and that his decision to reject Governor Brown's recommendation was not arbitrary or capricious, we affirm the district court's grant of summary judgment to appellants on this issue.

VII.

STANDING OF ENVIRONMENTAL GROUPS

The Natural Resources Defense Council, Inc., The Environmental Defense Fund, and various other environmental

organizations sought standing to raise the CZMA issues raised by the State of California and the local governments. The district court denied them standing because the CZMA was not enacted for their "especial benefit," and treated the briefs of these parties as *amici curiae*.⁴ Citing two recent Supreme Court cases, *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981); and *California v. Sierra Club*, 451 U.S. 287, 101 S.Ct. 1775, 68 L.Ed.2d 101 (1981), the district judge held that these environmental groups had no implied right of action to bring claims under the CZMA. Assuming, *arguendo*, this holding is correct, it does not resolve the standing issue.

The environmental groups rely for standing not on an implied right of action under the CZMA, but on Section 10 of the Administrative Procedure Act (APA), 5 U.S.C. § 702. Addressing this point, the district court held that they may not rely on the APA as the sole jurisdictional predicate. In this the district court erred. The environmental groups relied on the APA for standing, not for federal subject matter jurisdiction. We hold that the environmental groups have standing under 5 U.S.C. § 702. No remand is necessary, however, because the erroneous denial of standing did not affect the outcome of the case.

We first note that federal court jurisdiction is based on 28 U.S.C. § 1331, for civil actions arising under the laws of the United States, and is not at issue in this case. Second, an implied right of action under the statute violated is not a necessary predicate to a right to action under the APA. *Chrysler Corp. v. Brown*, 441 U.S. 281, 317, 99 S.Ct. 1705, 1725, 60 L.Ed.2d 208 (1979); *Glacier Park Foundation v. Watt*, 663 F.2d 882, 885 (9th Cir. 1981).

⁴ The district court dismissed the environmental groups and their claims from the lawsuit in a separate order of dismissal. *NRDC v. Watt*, 520 F.Supp. 1359 (C.D.Cal.1981) (order of dismissal).

Section 10 of the APA, 5 U.S.C. § 702 provides:

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

To have standing under this section both of the following questions must be answered affirmatively:

1. Has the party seeking standing suffered a legal wrong, or been adversely affected or aggrieved by the agency action (i.e., has he been "injured in fact"), and,
2. Are the interests sought to be protected by the party seeking standing "arguably within the zone of interests to be protected or regulated" by the statute in question.

See *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 151-53, 90 S.Ct. 827, 829, 25 L.Ed.2d 184 (1970); *Barlow v. Collins*, 397 U.S. 159, 90 S.Ct. 832, 25 L.Ed.2d 192 (1970); *Glacier Park Foundation v. Watt*, *supra*, at 885.

A mere assertion of organizational interest in a problem, unaccompanied by allegations of actual injury to members of the organization, is not enough to establish standing. *Sierra Club v. Morton*, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1971); *Valley Forge Christian College v. Americans United for the Separation of Church and State, Inc.*, ___ U.S. ___, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). Here, however, actual injuries to members have been alleged. The environmental groups claim that various of their members live, work, and enjoy recreational activities in the areas that will be affected by leasing of OCS tracts. They allege that their members' use of the coast and waters for commercial and sport fishing, scientific research, tourist activities, and recreation is threatened by OCS leasing. Injuries of a noneconomic nature to widely-share aesthetic and environmental interests, as well as economic injuries, can amount to sufficient "injury in fact" for standing under section 10. *Sierra Club v. Morton*, 405 U.S.

at 734, 92 S.Ct. at 1365, cited with approval in *United States v. SCRAP*, 412 U.S. 669, 686, 93 S.Ct. 2405, 2415, 37 L.Ed.2d 254 (1973); *Association of Data Processing Service Organizations v. Camp*, 397 U.S. 150, 90 S.Ct. 827, 25 L.Ed.2d 184 (1970); *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975). Thus, the environmental groups' allegations establish sufficient "injury in fact" to permit an affirmative answer to the first question.

We also find that the alleged injuries are within the "zone of interests" to be protected by Section 307(c) of the CZMA. As already pointed out, section 307(c)(1) is part of a Congressional scheme to carry out the overall purpose of the CZMA, which is to protect the very resources the environmental groups claim are threatened. Congressional findings underlying the CZMA recognize "a national interest in the effective management [and] protection" of the coastal zone as well as in its development and beneficial use. Section 302(a), 16 U.S.C. § 1451(a). Congress expressed concern over the "loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion" that has been "occasioned by population growth and economic development, including . . . extraction of mineral resources and fossil fuels." 16 U.S.C. § 1451(c). We agree with the finding in *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (C.D.Cal.1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979), that "[a]lthough sensitive to balancing competing interests, [the CZMA] was first and foremost a statute directed to and solicitous of environmental concerns." 456 F.Supp. at 919. Thus, the allegations of the environmental groups permit an affirmative answer also to the second question.

The CZMA issues the environmental groups sought to raise were identical to those raised by the State of California and the local governments, parties who clearly had standing. Additionally, amici curiae briefs were filed by the parties wrongly denied standing. Our review of the more than one thousand pages of the eighteen briefs filed in this case, as well as the extensive argument and our own research, convince us

that no stone was left unturned in presenting all aspects of the CZMA issue to this court. Allowing additional parties to present the same arguments would not affect the outcome of this case. Therefore, to remand the case for additional proceedings because of the district court's error with respect to standing would constitute a waste of scarce judicial resources.

AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND STAYED IN PART.

APPENDIX B

United States District Court,
C. D. California.
Aug. 18, 1981.

Nos. CV 81-2080, CV 81-2081.

The STATE OF CALIFORNIA, acting By and Through Governor Edmund G. BROWN, Jr., the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, the California Department of Conservation, *Plaintiffs*,

v.

James G. WATT as Secretary of the Interior; the United States Department of Interior; Edward Hastey as Acting Director of the United States Bureau of Land Management; Robert Burford as Director Designate of the United States Bureau of Land Management, in his official capacity as Director when and if assumed; and the United States Bureau of Land Management, *Defendants*.

NATURAL RESOURCES DEFENSE COUNCIL, INC.; the Sierra Club; Friends of the Earth; Friends of the Sea Otter; and the Environmental Coalition on Lease Sale 53, *Plaintiffs*,

v.

James G. WATT, in his official capacity as Secretary of the United States Department of the Interior; the United States Department of the Interior; Ed Hastey, in his official capacity as Acting Director of the United States Bureau of Land Management; Robert Burford, Director-Designate of the United States Bureau of Land Management, in his official capacity as Director when and if assumed; and the United States Bureau of Land Management, *Defendants*.

On cross motions for summary judgment in suit brought by the state of California and agencies thereof alleging that the federal defendants had violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin, the District Court, Pfaelzer,

J., held that: (1) final notice of lease sale No. 53, pertaining to the offering of designated tracts of the outer continental shelf for mineral development, "directly affected" the California coastal zone and, therefore, the Secretary of the Interior had to conduct prelease activities relating to lease sale No. 53 in a manner which was, "to the maximum extent practicable," consistent with the California coastal management program, pursuant to the Coastal Zone Management Act; (2) any bids received for the tracts at issue were null and void as were any oil and gas leases for said tracts; but (3) defendants were entitled to summary judgment with respect to their claims arising under the Outer Continental Shelf Lands Act, the National Environmental Policy Act, the Endangered Species Act, and the Marine Mammal Protection Act.

Order in accordance with opinion.

George Deukmejian, Atty. Gen., N. Gregory Taylor, Asst. Atty. Gen., Theodora Berger and John A. Saurenman, Deputy Attys. Gen., Los Angeles, Cal., for plaintiffs State of California, acting by and through Governor Edmund G. Brown, Jr., the California Coastal Commission, the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, and the California Department of Conservation.

Carol E. Dinkins, Asst. Atty. Gen., Michael W. Reed, Peter R. Steenland, and Anne S. Almy, Attys., U.S. Dept. of Justice, Washington, D.C., Andrea Sheridan Ordin, U.S. Atty., Frederick M. Brosio, Jr., Asst. U.S. Atty., Chief, Civ. Div., and James R. Arnold, Asst. U.S. Atty., Los Angeles, Cal., for defendants James G. Watt, as Secretary of the Interior; the United States Department of the Interior, Edward Hasteley as Acting Director of the United States Bureau of Land Management; Robert Burford as Director Designate of the United States Bureau of Land Management, in his official capacity as Director when and if assumed; and the United States Bureau of Land Management, in both cases.

E. Edward Bruce, Covington & Burling, Washington, D.C., for defendants in intervention ("WOGA") Western Oil and Gas Association, Atlantic Richfield Co., Chevron, U. S. A. Inc., Cities Service Co., Exxon Co., U. S. A., Getty Oil Co., Gulf Oil Corp., Mobil Oil Corp., Phillips Petroleum Co., Shell Oil Co., Sohio Petroleum Co., Tenneco Oil Co., and Texaco, Inc., in both cases.

Howard J. Privett, McCutchen, Black, Verleger & Shea, Los Angeles, Cal., William C. Miller and Donald E. Peterson, Pillsbury, Madison & Sutro, San Francisco, Cal., for defendant in intervention Chevron, U. S. A., Inc., in both cases.

Donatas Januta, Irwin D. Karp, Boyd, Januta & Karp, San Francisco, Cal., for plaintiffs in intervention, Local Governments, County of Humboldt, County of Marin, County of Mendocino, County of Monterey, County of San Luis Obispo, County of San Mateo, County of Santa Barbara, County of Santa Clara, County of Santa Cruz, County of Sonoma, City of Brisbane, City of Los Angeles, City of San Luis Obispo, City of Santa Cruz, City of Santa Monica and City of Seaside, in both cases.

Donald L. Clark, County Counsel, Lloyd M. Harmon, Jr., Chief Deputy County Counsel, Phillip L. Kossy, Deputy County Counsel, San Diego, Cal., for plaintiff in intervention County of San Diego, in both cases.

Trent W. Orr, Natural Resources Defense Council, Inc., San Francisco, Cal., Julie E. McDonald, Sierra Club Legal Defense Fund, Inc., San Francisco, Cal., for plaintiffs Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter and the Environmental Coalition on Lease Sale 53, in both cases.

OPINION

PFAELZER, District Judge.

I. BACKGROUND

Plaintiffs in this case are the State of California, the California Coastal Commission (hereinafter referred to as "CCC"), the California Air Resources Board, the California Resources Agency, the California Department of Fish and Game, and the California Department of Conservation. (This case is hereinafter referred to as *California v. Watt*.) The Natural Resources Defense Council, Inc. (hereinafter referred to as "NRDC"), the Sierra Club, the Friends of the Earth, the Friends of the Sea Otter, and the Environmental Coalition on Lease Sale 53 (hereinafter collectively referred to as "environmental groups") are plaintiffs in the companion case. The plaintiffs in the companion case are associations who claim an interest in the coastal zone and its resources. (The companion case is hereinafter referred to as *NRDC v. Watt*.)

Intervening as plaintiffs in the case of *California v. Watt* are certain cities and counties of the State of California which are located on, or in proximity to, the California coast. The plaintiff-intervenors are County of Humboldt, County of Marin, County of Mendocino, County of Monterey, County of San Diego, County of San Luis Obispo, County of San Mateo, County of Santa Barbara, County of Santa Clara, County of Santa Cruz, County of Sonoma, City of Brisbane, City of Los Angeles, City of San Luis Obispo, City of Santa Cruz, City of Santa Monica, and City of Seaside (collectively referred to as "local governments").

The defendants are James G. Watt (the "Secretary"), acting in his official capacity as Secretary of the Interior, the Department of Interior, Robert Burford, acting in his official capacity as Director of the Bureau of Land Management, and the Bureau of Land Management ("BLM").

Intervening as defendants in both actions are Western Oil and Gas Association ("WOGA"), Amoco Production Company,

Atlantic Richfield Company, Cities Service Company, Conoco, Inc., Exxon Corporation, Elf Aquitaine Oil and Gas, Getty Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, and Shell Oil Company. WOGA is a regional trade association of companies and individuals in the petroleum industry. The remaining defendant-intervenors are oil companies which submitted high bids on one or more tracts offered in Lease Sale No. 53 on May 28, 1981.

Lease Sale No. 53 consists of a maximum offering of 243 designated tracts of the Outer Continental Shelf ("OCS") for mineral development. The tracts in Lease Sale No. 53 lie in five different basins off the coast of California—one of which is the Santa Maria Basin. That basin extends generally from Point Sur in Monterey County in the north to Point Conception in Santa Barbara County in the south.

Requesting injunctive and declaratory relief, plaintiffs claim that defendants have violated five federal statutes in offering for competitive bidding certain oil and gas leases on tracts located in the Santa Maria Basin. This Court has jurisdiction over the claims asserted herein pursuant to 28 U.S.C. § 1331 (Federal question jurisdiction); 28 U.S.C. §§ 2201-2202 (Declaratory Judgment Act); 28 U.S.C. § 1361 (Mandamus); 5 U.S.C. §§ 701-706 (Administrative Procedure Act); 43 U.S.C. §§ 1349(a)(1), (b)(1) of the Outer Continental Shelf Lands Act ("OCSLA"); the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451 *et seq.*; the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*; the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(a)(1), (b)(1); and the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*

There are no material issues of genuine fact in dispute in these two consolidated cases.

The following is a chronology of the events relating to the lease sale at issue in the two cases.

In November 1977, BLM issued a Call for Nominations for Lease Sale No. 53. The Call requested the petroleum industry to designate specific tracts on which it was interested in

bidding if a sale were held. It also asked federal, state and local governments, universities, environmental organizations, research institutions, and the public to identify specific tracts which they believe should be excluded from leasing or should be leased under particular restrictions due to conflicting resource values or environmental factors.

In October 1978, the Department of Interior announced the tentative tract selection for Lease Sale No. 53. The Santa Maria Basin contained 115 of the 243 tracts to be involved in the sale.¹

A draft environmental impact statement ("DEIS") was released for public comment in April 1980. The DEIS, which analyzed the environmental impacts in the five basins to be included in Lease Sale No. 53, was based on a resource estimate of 404 million barrels for the Santa Maria Basin.

On July 8, 1980, the California Coastal Commission requested that the Secretary submit a consistency determination at the time of the issuance of the proposed notice of sale.

In September 1980, a final environmental impact statement (the "EIS") was released. Shortly before its publication, on or about August 28, 1980, the United States Geological Survey ("USGS") made available revised resource estimates for the Santa Maria Basin in the amount of 794 million barrels of oil. The revised estimate, which almost doubled the previous estimate, was incorporated in an addendum to the EIS.

Also during the fall of 1980, BLM consulted with the National Marine Fisheries Service ("NMFS") and the Fish and Wildlife Service ("FWS") concerning the jeopardy posed to any endangered or threatened species by Lease Sale No. 53. The NMFS rendered a biological opinion that Lease Sale No. 53 would not jeopardize the endangered gray whale. The FWS

¹ Although 243 tracts were originally to be considered for proposed Lease Sale No. 53, BLM later established that the total sale area would involve 242 tracts comprising 1.315 million acres.

rendered a biological opinion that the sale would not jeopardize the threatened sea otter.

During this period, a Secretary Issue Document ("SID") was prepared by the Department of Interior. An SID is an internal document intended to aid the Secretary in making decisions concerning lease sales. The Department of Interior released the SID for Lease Sale No. 53 in October 1980.

On October 16, 1980, former Secretary of the Interior Cecil D. Andrus issued the proposed notice of sale for Lease Sale No. 53. The notice proposed leasing only within the Santa Maria Basin. Secretary Andrus deleted the four other basins from the proposed sale.

By letter of October 22, 1980, the Department of Interior notified the CCC of its "negative determination" that the preleasing activities associated with Lease Sale No. 53 had no "direct effects" on California's coastal zone. In response to the negative determination, on December 16, 1980, the CCC adopted a resolution that the deletion of 31 tracts (29 tracts in the final notice of sale) in the northern portion of the Santa Maria Basin was necessary in order for Lease Sale No. 53 to be consistent with the California Coastal Management Plan ("CCMP"). (As 4 of the tracts were combined as 2 for sale purposes, the CCC resolution is actually directed to 29 tracts.)

On December 24, 1980, the Governor of California, Edmund G. Brown, Jr., responding to Secretary Andrus' proposed notice of sale, recommended the deletion of 34 tracts located in the northern portion of the Santa Maria Basin. (Although the recommendation referred to 34 tracts, 4 of the tracts were combined as 2 tracts for sale purposes; therefore, only 32 tracts were actually encompassed by the Governor's recommendation.) Governor Brown's letter and enclosed recommendations were subsequently transmitted to the new Secretary of the Interior Watt by a memorandum from Deputy Assistant Secretary Heather L. Ross.

On February 10, 1981, Secretary Watt issued a revised proposed notice of sale for Lease Sale No. 53. The four basins

previously deleted from the proposed sale were once more included in the sale. The revised notice continued to propose leasing in the Santa Maria Basin. In transmitting the revised proposed notice to Governor Brown, Secretary Watt requested recommendations pursuant to § 19 of OCSLA, 43 U.S.C. § 1345.

By letter dated April 7, 1981, Governor Brown submitted his recommendations concerning the revised Lease Sale No. 53. He reiterated his position that, based upon the balancing test of § 19 of OCSLA, the northern 32 tracts should be deleted from the sale. Enclosed with the letter detailing Governor Brown's recommendations were comments and recommendations from various state agencies and local governments in California.

On April 10, 1981, the Department of Interior issued a news release in which Secretary Watt announced that he planned to divide Lease Sale No. 53 into two sales, with the sale of the tracts in the Santa Maria Basin to be held in May 1981 and the sale of the remaining tracts to be postponed. The Secretary stated that his decision to lease the entire Santa Maria Basin was based on a finding of overriding national interest. The final notice of sale for Lease Sale No. 53, Santa Maria Basin, was published on April 27, 1981.

By letter dated May 1, 1981, Secretary Watt notified Governor Brown of the rejection of California's recommendations concerning the lease sale in the Santa Maria Basin. In the communication sent to Governor Brown, Secretary Watt provided a brief explanation of the basis for his previous rejection of the recommendation.

Between the Call for Nominations on OCS Lease Sale No. 53 in November 1977 and May 1, 1981, the State of California, its agencies and the local governments submitted to the Department of Interior more than 20 separate communications seeking the deletion or delay of the sale of tracts in the Santa Maria Basin. Excluding the call for nominations and the letter of May 1, the Department of Interior submitted at least three

separate communications to the state or to the CCC in regard to the disputed tracts within Lease Sale No. 53.

On April 29, 1981, plaintiffs in *California v. Watt* and in the companion case of *NRDC v. Watt* filed this action. On May 27, 1981, the Court granted a preliminary injunction in *California v. Watt*. Subsequently, on July 10, 1981, the consolidated cases came on for hearing on cross motions for summary judgment.

With respect to the CZMA, 29 tracts in the northern portion of the Santa Maria Basin are at issue. (Due to the consolidation of 4 tracts into 2, the 31 tracts, as initially identified by Secretary Andrus in the October 1980 notice of sale, were viewed as 29 tracts at the time of the April 1981 final notice of sale.) The 29 tracts, numbered 129 to 155 and 158 to 161, range seaward from 3 miles to approximately 24 miles and lie in an area in which the water depths range from 50 to 750 meters (162 to 2,437 feet). See Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); Environmental Impact Statement ("EIS"). Vol. 1 at 1-9. Tract numbers 130, 131, 133, 134, 136 to 138, 140 to 151, 153 to 155, 160 and 161 are within 12 miles of the coastline. See Defendant's Exhibit L-G at 289-90 (letter from the State of California's Department of Fish and Game to the Resources Agency of the State of California). Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); Administrative Record No. 411w (California Coastal Comm. Letter, April 8, 1981 at 2); Administrative Record No. 165w (CCC Comments on the Draft Environmental Impact Statement ("DEIS") on Proposed OCS Lease Sale #53, June 4, 1980 at 2); Administrative Record No. 158w (U.S. Dept of Interior, BLM Press Release, May 9, 1980); EIS at 1-10. Of these tracts, numbers 138, 142, 143, 146, 147 and 151 are within 6 miles of the shore, EIS at 2-18; SID at 73; portions of tract numbers 130, 131, 134, 137, 141, 144, 145, 149, 150, 154, 155, 160 and 161 are within 6 nautical miles of the shore, EIS at 2-18, 2-19; Defendant's Exhibit L-G at 292-93, letter from the Department of Parks and Recreation to the U.S. Dept. of Interior, Office of Planning and Research. The remaining tracts,

numbers 129, 132, 135, 139, 148, 152, 158 and 159 range seaward from approximately 12.5 to 24 miles. See Administrative Record No. 511w (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3).

With respect to the other statutes, NEPA, OCSLA, ESA and MMPA, three additional tracts are in dispute. They are numbered 162 to 164. They also range seaward from 3 miles to approximately 24 miles and lie in an area in which the water depths range from 50 to 750 meters (162 to 2,437 feet). Administrative Record No. 511 (U.S. Dept. of Interior, BLM Memorandum, June 4, 1981 at 3); EIS, Vol. 1 at 1-9.

II. THE COASTAL ZONE MANAGEMENT ACT

A. The Issue Presented

Plaintiffs in this case contend that the Final Notice of Lease Sale No. 58 "directly affects" the California coastal zone and, therefore, the Secretary of the Interior must conduct the prelease activities relating to Lease Sale No. 53 in a manner which is, "to the maximum extent practicable", consistent with the California Coastal Management Program (CCMP), pursuant to § 307(c)(1) of the CZMA. 16 U.S.C. § 1456(c)(1). Thus, the principal issue in this case with respect to the CZMA is whether the Secretary violated that Act by making a "negative determination" that no consistency review was required for the Final Notice of Lease Sale No. 53. *Id.*; 15 C.F.R. §§ 930.34-.35

The threshold test for the application of § 307(c)(1) is whether the activity in question will have a "direct effect" on the coastal zone. If a federal agency determines that its proposed activity *will not* directly affect the state's coastal zone, it must provide the administrator of the state coastal program with written notice briefly setting forth the reasons for that conclusion. 15 C.F.R. § 930.35(d) (1980). That notice is called a "negative determination". *Id.* On the other hand, if a federal agency determines that the activity in question *will* directly affect the coastal zone, the federal agency must provide the

administrator of the state coastal program with a written notice, called a "consistency determination", that the activity will be carried out in a manner which conforms with the state program. 15 C.F.R. § 930.34(a) (1980).

The issue is squarely presented in this case of first impression: does the Final Notice of Lease Sale with respect to the 29 tracts in the northern portion of the Santa Maria Basin directly affect the coastal zone of the State of California? The resolution of this issue turns on an interpretation of the phrase "directly affect" as it is used in the CZMA.

Established rules of statutory construction require that the Court turn first to the "language in which the act is framed, and if that is plain, . . . to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917). If the meaning of the statutory text is clear and unambiguous, the Court's task is minimal. That is not the case here as the language of § 307(c)(1) is neither clear nor unambiguous.² The Act itself provides no definition of the key terms employed in the section. Thus, in order to construe and interpret § 307(c)(1), the Court is required to turn to the Act's stated purposes, the legislative history, and the interpretations of agencies charged with administering the Act.

B. The Statutory Purpose

Effectuating the purpose of a statute should be a primary concern of a court in construing the meaning of disputed language within it. *Philbrook v. Glodgett*, 421 U.S. 707, 713, 95

² During the 1980 Oversight Hearings held before the House Subcommittee on Oceanography, Chairman Gerry E. Studds remarked, "I think particularly that sections 307 and 308 challenge anyone whose native tongue is English to discern what Congress had in mind when it wrote those sections." Proposed Amendments to the CZMA: Hearings on H.R. 6956 and H.R. 6979 before the Subcommittee on Oceanography of the House Committee on Merchant Marine & Fisheries, 96th Cong., 1st and 2d Sess. 88 (1980).

S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975), quoting *United States v. Heirs of Boisdoré*, 8 How. 113, 122, 12 L.Ed. 1009 (1849). Further, a court should not ignore policy considerations in favor of mechanical interpretation in seeking the proper construction of a statute. *United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1280 (9th Cir. 1980), citing to *United States v. Anderson*, 76 U.S. 56, 65-66, 19 L.Ed. 615 (1869). Thus, the question of which activities fall within the scope of 307(c)(1) must be considered in light of the statutory purpose of the CZMA.

The CZMA was enacted in order to provide comprehensive, coordinated planning for the protection and beneficial use of the resources of the coastal zone. 16 U.S.C. §§ 1451, 1452. Special emphasis was placed on the objective of preserving the natural resources within this area "for this and succeeding generations". 16 U.S.C. § 1452(1). In enacting the CZMA, Congress intended to establish an effective scheme for the long-term management of the valuable resources found within the coastal zone of the United States.

The "key" to the management scheme envisioned by Congress is "to encourage the states to exercise their full authority over the lands and waters in the coastal zone". 16 U.S.C. § 1451(i). This authority granted to the states is to be exercised "in cooperation with Federal and local governments and other vitally affected interests". *Id.* Thus, the primary authority in the management scheme is to be bestowed upon those coastal states which develop and implement comprehensive management programs for their respective coastal areas.

While the Act assigns final responsibility for management to states with such a program, the federal agencies are given significant power over the policy choices which a state incorporates into its coastal management plan. Under the Act, the Secretary of Commerce may not give the required approval to the state's proposed plan "unless the views of Federal agencies principally affected by such program have been adequately considered". 16 U.S.C. § 1456(b). Another

prerequisite for the approval of the Secretary of Commerce is a finding that the state's program "provides for adequate consideration of the national interest". 16 U.S.C. § 1455(c)(8).

To induce the states to develop and implement comprehensive management programs in accord with the views of federal agencies, Congress provided that federal activities are to be consistent with the approved state management program.³ To this end, Congress designated five categories of federal actions which are subject to the requirement of a consistency review.

The consistency provisions under the CZMA, each subjecting particular categories of federal actions to review, are: (1) federal activities, conducted or supported by a federal agency, which directly affect the coastal zone; (2) federal development projects in the coastal zone; (3) activities of applicants for federal licenses or permits where the proposed activities will affect land and water uses in the coastal zone; (4) OCS post-lease sale activities which require a federal license or permit and will affect any land use or water use in the coastal zone; and (5) federal programs which provide funding to state and local governments for projects which will affect the coastal zone §§ 307(c)-(d), 16 U.S.C. §§ 1456(c)-1456(d). Administrative procedures have been established to facilitate the implementation of the consistency requirements under the Act.⁴

³ Linsley, *Federal Consistency and Outer Continental Shelf Oil and Gas Leasing*, 9 Boston C. Env'tl Affairs L.Rev. 429, 433 (1981).

⁴ The federal agency makes an initial determination whether its activity "directly affects" the coastal zone. 15 C.F.R. § 930.33(a) (1980). The federal agency must evaluate its activity in light of the provisions of the state's coastal management program. 42 Fed.Reg. 43,590 (1977). If the federal agency determines that the activity will directly affect the coastal zone, it must provide the state with a "consistency determination", which indicates whether the proposed activity will be undertaken in a manner which conforms with the state program. 15 C.F.R. §§ 930.34(a), 930.39. If the federal agency determines instead that the activity has no direct effects upon the coastal zone, it must provide the state with a "negative determina-

Obviously, one incentive for state participation in a federal coastal management program is the federal funding for the program. 16 U.S.C. §§ 1454, 1455. The grants, however, are of limited duration. Thus, in reality, the requirement of consistency review is the principal permanent inducement to the state's development of a coastal management plan. There is therefore a *quid pro quo* in the legislative scheme:⁵ the state agencies are to participate actively in designing the state management program, and, in return, the federal agencies "shall conduct" their activities "in a manner which is, to the maximum extent possible, consistent" with the state's program. 16 U.S.C. § 1456(c) (emphasis added).

The management program created under the CZMA is intended to be comprehensive. Congress intended that federal-state consultation procedures extend to all phases of the management of coastal resources. To be considered during consultation are such issues as the orderly siting of energy facilities, including pipelines, oil and gas platforms, and crew and supply bases, and the minimization of geological hazards. 16 U.S.C. §§ 1452(2)(B)-(C), 1453(6). Directing the coastal states to identify potential problems with respect to marine and coastal areas and to prevent unavoidable losses of any valuable environmental or recreational resource as a result of "ocean energy activities", Congress intended that the states be involved at the initial stages of decision-making related to the coastal zone. 16 U.S.C. §§ 1456a(c)(3); 1456b(a). The Act requires that the coastal state's management program include a "planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process for *anticipating and managing*

tion". *Id.* § 930.35(d). Mediation is available in the event that the federal agency and the state disagree as to the propriety of a negative determination or the validity of a consistency determination. *Id.* §§ 930.110-115. See *Linsley, supra*, at 438-440.

⁵ Schoenbaum & Parker, *Federalism in the Coastal Zone*, 57 N.C.L.Rev. 231, 239 (1979).

impacts from such facilities". § 1454(b)(8) (emphasis added). In order to anticipate impacts and prevent unnecessary losses in the coastal zone, it is manifest that the consultation process was intended to begin at the earliest possible time.

Any interpretation of the phrase "directly affect" must give due consideration to the reciprocal roles intended to be assigned to federal agencies and to the states. The states are intended to have a significant role in essential planning and coordination for the development of the coastal zone. They are intended to be involved in every stage of the planning from drawing board to execution.

Special grants are offered to induce the states to create federally-approved comprehensive management plans which provide for inter-governmental cooperation. California designed and created such a plan.⁶ It would be anomalous to impute to the Congress which induced the states to formulate these plans an intention to permit the federal government to proceed with critical decision-making in total disregard of them. Congress can hardly have had such an intent. The CZMA was purposely designed to encourage cooperation between federal, state and local governments rather than conflict, and it should be construed in a manner which will effectuate that purpose.

Pre-leasing activities, including the call for nominations, the publication and circulation of an environmental impact statement, and the publication of a final notice of lease sale, define and establish the basic parameters for subsequent development and production. During the pre-leasing stage, which culminates in the final notice of lease sale, critical decisions are made as to the size and location of the tracts, the timing of the

⁶ The California Coastal Management Program ("CCMP") is the program adopted by California pursuant to the CZMA. See *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (C.D. Cal. 1978).

sale and the stipulations to which the leases are subject.⁷ Each of these are key Outer Continental Shelf (hereinafter referred to as the OCS) planning decisions. The selection of tracts to be let determines where the lessee can explore and produce oil and gas. The decision to offer or delete various tracts also determines which estuaries, reefs, wetlands, beaches, or barrier islands are exposed to the risk of oil spills and which are not. The particular stipulations imposed on the lessors, along with the designated location of the tracts, influence the flow of vessel traffic, the placement of platforms and drilling structures, as well as the siting of on-shore construction. Stipulations included in the lease determine what equipment is to be used and what training is to be provided by lessees to those working on the tracts. In addition, decisions made during the pre-leasing stage establish the timing of OCS development and production.⁸ Thus, the leasing sets in motion the entire chain of events which culminates in oil and gas development.

The purpose of the act would not be furthered by excluding the states from the critical decision-making relating to oil and gas resources in the OCS. If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual lessees as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decision-making envisioned by the draftsmen of the CZMA.

⁷ Absent special circumstances, no tract leased on the OCS is to exceed 5,760 acres. 43 U.S.C. § 1337(b)(1). The lessee is entitled to explore, develop and produce the oil and gas found within the area of that tract.

⁸ The original lease is valid for a period of 5 to 10 years. 43 U.S.C. § 1337(b)(2).

C. The Legislative History Of The CZMA

The legislative history, while somewhat inconclusive, sheds some light on the Congressional intent in enacting this provision. As the Act was first passed in 1972, amended in 1976 and in 1980, Congress has had ample opportunity to debate the legislation. The text of § 307(c)(1) in the original bill, as passed by both House and Senate, provided that all federal activities "in the coastal zone" were subject to § 307(c)(1). Without explanation, the Conference Committee altered the language and substituted the phrase "directly affecting the coastal zone" for "in the coastal zone". On balance, this substitution seems to have been intended to expand the scope of the provision. Activities occurring outside of the coastal zone, such as OCS activities, as well as activities within the coastal zone, were made subject to consistency review. A caveat, however, was appended to the revision. In order to be subject to consistency review, the effect must be "direct". The 1972 legislative history is silent as to the import of this change.

In 1976 Congress amended the CZMA. Coastal Zone Management Act Amendments of 1976, Pub.L.No.94-370, 90 Stat. 1013 (1976) (amending 16 U.S.C. §§ 1451-1464). Section 307(c)(1) was not amended, and the legislative history of the 1976 amendments does not address this particular provision. However, there are references within the legislative history to the question of the applicability of consistency requirements to the decision to lease. Certain statements relate to the purpose of the Act as a whole. The Senate Report expressed concern that "[t]here is very little coordination or communication between Federal agencies and the affected coastal states prior to major energy resource development decisions, such as the decision to lease large tracts of the OCS for oil and gas Full implementation of the Coastal Zone Management Act of 1972 . . . could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act". S.Rep.No.94-277, 94th Cong., 2d Sess. 3, *re-printed in* [1978] U.S.Code Cong. & Ad.News 1770.

During its consideration of the 1976 Amendments, Congress did address a different subsection within the same section of the 1972 Act—307(c)(3), now § 307(c)(3)(A). That subsection requires that applicants for a federal permit or license for an activity affecting the coastal zone include in the application a certification of consistency of the proposed activity with the state's coastal management program. Both the House and the Senate concluded that Congress had intended that the "consistency clause" (i.e., § 307(c)(3)) in the 1972 act apply to Federal leases for offshore oil and gas. S.Rep.No.94-277, *supra*, 19-20, 36-37, 53-54, 59; H.R. Rep.No.94-878, 94th Cong., 2d Sess. 4, 52-53, 67-68. Nevertheless, by amendment on the floor of the House, the explicit requirement of consistency certification for offshore leasing was deleted from § 307(c)(3). 122 Cong.Rec. 6128. The final version of § 307(c)(3) imposed no consistency certification requirement on the lessee.

Defendants infer from the Congressional decision to exclude leasing from the consistency certification process under § 307(c)(3) an intention to exclude pre-leasing activities from all consistency review. They assert that § 307(c)(3) supersedes § 307(c)(1). Thus, defendants read the Congressional silence as to the continuing validity of § 307(c)(1) as a repeal by implication.

The Supreme Court has consistently applied the "cardinal rule . . . that repeals by implication are not favored". *Morton v. Mancari*, 417 U.S. 535, 549-551, 94 S.Ct. 2474, 2482-2483, 41 L.Ed.2d 290 (1974); *Wood v. United States*, 16 Pet. 342-343, 363, 10 L.Ed. 987 (1842). In the absence of an affirmative showing of an intention to repeal, effect must be given to each section of the statute. *Id.* Where there is no "positive repugnancy" between the two provisions, the subsequently enacted provision does not repeal the previously enacted provision. *United States v. Borden Co.*, 308 U.S. 188, 198-99, 60 S.Ct. 182, 188, 84 L.Ed. 181 (1939).

There is no "repugnancy" between § 307(c)(1) and 307(c)(3). The former subsection imposes obligations on the federal

government which in the present context is the lessor, whereas the latter subsection imposes obligations on private sector applicants for a federal license or permit, which in the present context are the lessees. Certainly the legislative history for the 1976 Amendments does not imply any intention to make § 307(c)(3) the exclusive mode of invoking consistency review. Under § 307(c)(3), consistency requirements are imposed on the specific activities relating to permits and licenses, whereas under § 307(c)(1), consistency requirements are imposed on a residual category of federal actions which are neither development projects nor related to permits and licenses. 15 C.F.R. § 930.31 (1980); *see* 44 Fed.Reg. 37,146 (1979) (NOAA's comment to 15 C.F.R. § 930.31 (1979)).

In 1980, Congress reauthorized the CZMA. Coastal Zone Management Improvement Act of 1980, Pub.L.96-464, 94 Stat. 2060 (1980). Congress amended certain sections of the Act, but did not alter any of the section 307 consistency provisions. Both the House and Senate Committees acknowledged the existence of a disagreement over the applicability of the consistency provisions to the final notice of OCS lease sale.⁹ In order to clarify the intent of these provisions, the House Committee explained in its report accompanying the 1980 amendments that the 1976 amendments to § 307 "did not alter Federal agency responsibility to provide States with a consistency determination related to OCS decisions which preceded issuance of leases".¹⁰ H.R.Rep.No.96-1012, 96th Cong., 2d

⁹ "The committee is cognizant of one disagreement between California and the Department of Interior which led to a resolution effort through formal mediation proceedings conducted by the Department of Commerce". H.Rep. R.No.96-1012, 96th Cong., 2d Sess. 34, reprinted in [1980] U.S.Code Cong. & Ad.News 4382. *See also* S.Rep. No. 96-783, 96th Cong., 2d Sess. 11.

¹⁰ There was no conference report on the Coastal Zone Management Improvement Act of 1980. After the language of the Senate bill was amended to contain the text of the House bill, the Senate bill was passed in lieu of the House bill. [1980] U.S.Code Cong. & Ad.News

Sess. 28, *reprinted in* [1980] U.S.Code Cong. & Ad.News 4376. The Senate Committee specifically discussed the relationship between section 307(c)(1) and OCS pre-lease activities:

The Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone.

S.Rep.No.783, 96th Cong.2d Sess. 11 (1980).

The 1980 Congress also recognized the uncertainty that had arisen concerning the interpretation of the threshold test of "directly affecting" the coastal zone. H.R.Rep.No.96-1012, 96th Cong., 2d Sess. 34-35, *reprinted in* [1980] U.S.Code Cong. & Ad. News 4382-83. Referring to earlier congressional deliberations, the House Committee presented two alternative definitions of the phrase "directly affecting". The threshold test applies "whenever a Federal activity ha[s] a functional interrelationship from an economic, geographic or social standpoint with a State coastal program's land or water use policies". *Id.* at 34, U.S. Code Cong. & Admin.News at 4382. As an alternative phrasing of the threshold test, the House Committee stated that the Federal consistency requirements should apply "when a Federal agency initiates a series of events of coastal management consequence". *Id.* Congress indicated its support of an "expansive interpretation of the threshold test". *Id.* at 35, U.S.Code Cong. & Admin.News at 4383. In order to effectuate the purposes of the Act, consulta-

4362. Under these circumstances, the House Report should be accorded greater weight than might be appropriate if there were a more authoritative source from which to glean the intent of the legislature as a whole. *See* D. Sands, 2A Sutherland Statutory Construction § 48 (1973).

tion between federal and state agencies should occur "at the earliest practicable time". *Id.* at 34, U.S. Code Cong. & Admin. News at 4382; *see also* S. Rep. No. 783, *supra*.

Defendants contend that the 1980 legislative history is not entitled to great weight. They argue that, in interpreting the intent of the body which enacted the statute, no deference is due to statements of a "post-enactment Congress". In support of this view, defendants cite a frequently quoted dictum: "[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one". *United States v. Price*, 361 U.S. 304, 313, 80 S.Ct. 326, 331, 4 L.Ed.2d 334 (1960).

The present situation is readily distinguishable from that in *United States v. Price*. There the inferences of legislative intent did not flow from explicit Congressional statements, but from Congressional inaction on amendatory legislation. The sole passing reference by Congress to the disputed provision was characterized by the court in *United States v. Price* as "a slender reed". *Id.* at 313, 80 S.Ct. at 332. In contrast, the recent legislative history of the CZMA contains statements of great significance from both houses of Congress.

While subsequent legislative history generally is not controlling, neither should subsequent congressional interpretation be "rejected out of hand". *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n.8, 100 S.Ct. 1932, 1938, 64 L.Ed.2d 593 (1980). While acknowledging that the admonition propounded in *United States v. Price* remains sound, the Supreme Court explained in *Andrus* that a court should nevertheless give appropriate weight to arguments predicated upon congressional actions. *Id.* The court should not overlook valuable sources in the search for legislative intent. *See Walt Disney Productions v. United States*, 480 F.2d 66, 68 (9th Cir. 1973), *cert. denied*, 415 U.S. 934, 94 S.Ct. 1451, 39 L.Ed.2d 493 (1974).

Here, the 1980 legislative history has special relevance. In reauthorizing the 1972 Act, Congress made explicit references

to the provision in dispute, as well as to the very phrase within the disputed provision. This Court is bound to give careful consideration to the explicit statements made by the 1980 Congress during its reauthorization of the CZMA.

Only a definition which provides for the application of § 307(c)(1) at the decision-making stage of the leasing process will effectuate the congressional intent and give proper meaning and focus to the Act. Clearly, the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone. Any other interpretation would thwart the purposes of the Act.

D. Interpretation By Reference To Related Statutes

The defendants argue that the Secretary's obligations under § 307(c)(1) must be interpreted in light of his obligations under OCSLA, as well as under NEPA and ESA. An expansive interpretation of the Secretary's duties under § 307, according to defendants, would create a conflict with the functions and purposes of the other applicable statutes affecting the OCS.

As to the relationship between OCSLA and the CZMA, defendants contend that to impose the requirement of consistency review on pre-leasing activities would nullify § 19 of OCSLA which provides for the Secretary's consideration of recommendations submitted by a state governor. 43 U.S.C. § 1345. Defendants explain that the scheme of regulation of the OCS as set forth in the 1978 Amendments of OCSLA, Pub.L.No.95-372, 92 Stat. 629 (1978), accords the Secretary the authority to direct development of the OCS. In defendants' view, the construction of the CZMA urged by plaintiffs would result in a substitution of the state's judgment for the Secretary's, contrary to the intent of Congress as expressed in the amendments to OCSLA. Therefore, defendants urge the Court to give "overriding weight" to § 19 of OCSLA in construing § 307 of the CZMA.

At the outset, it should be noted that the CZMA has certain unique objectives which set it apart from the other statutes

relied upon by defendants. NEPA, OCSLA, ESA, and the CZMA share the common goal of preserving and protecting the nation's resources.¹¹ Only the CZMA was intended to encourage active participation of state and local governments in developing and implementing the plans for meeting the common goal.¹² In the remaining statutes, Congress imposes certain responsibilities on the federal government and federal agencies without mandating participation by the states into the statutory scheme.

Although both the CZMA and OCSLA focus on offshore oil and gas leases, there is a marked difference in the central focus of each statute. *Massachusetts v. Andrus*, 594 F.2d 872 (1st Cir. 1979). Under OCSLA, the emphasis is upon development of oil, gas and other minerals. In contrast, the CZMA is a

¹¹ the CZMA was enacted by Congress "to preserve, protect, develop, and, where possible, to restore or enhance, the resources of the Nation's coastal zone." 16 U.S.C. § 1452(a).

OCSLA directs the Secretary of the Interior to prescribe rules and regulations deemed "necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein." 43 U.S.C. § 1334(a)(1).

NEPA recognizes that "each person has a responsibility to contribute to the preservation and enhancement of the environment". 42 U.S.C. § 4331(c). See also 42 U.S.C. § 4331(b). Principal purposes of the ESA are "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species". 16 U.S.C. § 1531(b).

¹² See 16 U.S.C. § 1452. As one commentator observed, the CZMA "reflects a strong congressional intent to give states and their delegates a more significant management role than the national government". Finnell, *Federal Regulatory Role in Coastal Land Management*, 1978 American Bar Foundation Research Journal 173, 249-250.

statute directed to, and solicitous of, environmental concerns. *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Due to this significant difference in objectives between CZMA and the other statutes, it is doubtful that it would be proper to interpret the CZMA in light of the other statutes.

Obviously, the court must construe federal statutes so that they are consistent with each other, as by this means congressional intent can be given its fullest expression. *Get Oil Out! Inc. v. Exxon Corp.*, 586 F.2d 726, 729 (9th Cir. 1978). If particular statutory provisions can be construed to be in harmony with each other, it is unnecessary to accord "overriding weight" to a single provision. Therefore, the court must examine to what extent § 19 of OCSLA imposes duties which conflict with the consistency requirements under § 307(c)(1) of the CZMA. Where sections of the statutes, such as § 19 of OCSLA and § 307 of the CZMA seem to overlap, it is the role of the court to give each statutory section effect as long as they are capable of co-existence. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S.Ct. 1989, 1993, 48 L.Ed.2d 540 (1976), quoting *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). Here, both § 19 of OCSLA and § 307 of the CZMA can be given effect without frustrating the purpose of either statute.

An examination of the language of the "savings clause" in OCSLA resolves the misconception that § 19 of OCSLA was intended to repeal the consistency requirements under § 307 of the CZMA. Section 608 of the 1978 Amendments to OCSLA expressly provides: "[N]othing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972". 43 U.S.C. § 1866. In its discussion of § 19 of OCSLA, the House Committee attempted to clarify the potentially overlapping roles of the federal agency and the state in light of the CZMA's consistency requirements. Referring to the savings clause, 43 U.S.C. § 1866, the House Report explains: "Specifically, nothing is intended to alter procedures under [the Coastal Zone Management] Act for consistency

once a state has an approved Coastal Zone Management Plan". H.R. Rep. 95-590, 95th Cong., 2d Sess. 153, n.52, *reprinted in* [1978] U.S. Code Cong. & Ad. News 1559.

An analysis of the rights and duties imposed by the two statutes reveals the mode of "co-existence" of the CZMA and OCSLA. Although both provisions focus on the leasing process, neither the obligations imposed nor the parties involved in the two provisions are identical. Section 19 of OCSLA requires that the Secretary consider recommendations submitted by the governor of the state where the lease sale is to be held. 43 U.S.C. § 1345. Once the Secretary has made certain determinations with regard to the recommendation, his decision to accept or reject the recommendations is final. In contrast, § 307(c) of the CZMA does not require that the Secretary evaluate such recommendations. The frame of reference for the Secretary's determination under the CZMA is the state's coastal management plan. The CZMA does not deprive the Secretary of the opportunity to regulate size, timing or location of proposed lease sales. No absolute veto power has been bestowed upon plaintiffs by § 307(c)(1). Instead, the CZMA provides a more complete opportunity for federal-state consultation and cooperation. In the event serious disagreements arise between the state and the federal government as to the propriety of the federal agency's determination, either party may seek mediation. 16 U.S.C. § 1456(h); 15 C.F.R. § 930.113-116.

In claiming that § 19 of OCSLA denies the states the right to participate in consultation or coordination of pre-leasing activities, defendants rely on *California v. Kleppe*, 604 F.2d 1187 (9th Cir. 1979). In *California v. Kleppe*, the Ninth Circuit focused on the question whether Congress intended the Secretary of the Interior or the Environmental Protection Agency to promulgate air quality regulations for the Outer Continental Shelf. The Secretary claimed authority to promulgate the regulations pursuant to OCSLA, while the EPA claimed authority to do so under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.* Looking to the legislative history and the language of the

1978 Amendments to OCSLA, the court found no indication that Congress had contemplated "dual jurisdiction" of the Secretary and of EPA over OCS activities which affect air quality. *California v. Kleppe*, *supra* at 1194. According to the court's analysis, there is no suggestion that the Secretary is to share authority to promulgate air quality regulations for the OCS. *Id.* at 1193. *

The present case is readily distinguishable from *California v. Kleppe*. In contrast, here Congress did contemplate concurrent authority of the state and the federal agencies over the coordination of OCS activities. Although the savings clause, § 608 of OCSLA, 43 U.S.C. § 1866, does not explicitly protect whatever authority EPA might have had pursuant to its jurisdictional grant under the Clean Air Act, 42 U.S.C. § 7607(b)(1), it does explicitly provide that the requirements under the CZMA are neither modified nor repealed by the 1978 Amendments to OCSLA. The duties imposed on the Secretary under OCSLA are compatible with the duties imposed under the CZMA. Enforcement of the requirements of § 307 of the CZMA will not frustrate the Secretary's authority under OCSLA to make the resources of the OCS "available for expeditious and orderly development, subject to environmental safeguards". See 43 U.S.C. § 1332(3). Participation in the consultation process envisioned by the CZMA will, in fact, further the purposes of the CZMA.

Even though the obligations imposed on the Secretary under the CZMA do not impair his authority under OCSLA, it is conceded that the Secretary may be confronted by the complex task of resolving competing interests and balancing the numerous priorities set by Congress. Also, some delays are inherent in a planning process involving participants at all levels of government. But, it is not the proper function of the judiciary to question the means Congress has chosen to manage the resources of the coastal zone. This is a matter committed to legislative judgment. *Cf. Hodel v. Virginia Mining and Reclamation Assoc.*, ___ U.S. ___, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981).

E. NOAA's Interpretation

The administrative agency's interpretation of a statutory provision also aids the Court in its determination of the legislative intent of the CZMA. It is a settled principle that an agency's interpretation of a statute is normally entitled to deference from the courts. *Train v. NRDC*, 421 U.S. 60, 87-95 S.Ct. 1470, 1485, 43 L.Ed.2d 731 (1975); *Udall v. Tallman*, 380 U.S. 1, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); see also *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (C.D.Cal.1978). Here, the National Oceanic and Atmospheric Administration ("NOAA") is the agency within the Department of Commerce charged with the responsibility of promulgating regulations for the CZMA. See *American Petroleum Institute v. Knecht*, *supra*, at 908. During enactment of the 1976 amendments, Congress specifically directed NOAA to clarify certain requirements of the Act and thus affirmed the responsibility NOAA had assumed in administering the 1972 Act. The fact of NOAA's technical expertise in matters relating to the nation's coasts also suggests that deference should be accorded to its continuing construction of this Act. See *Ethyl Corp. v. Environmental Protection Agency*, 176 U.S.App.D.C. 373, 541 F.2d 1 (1976).

Until May 1981, NOAA consistently took the position that Interior's pre-leasing activities were subject to consistency review. For instance, in 1977, NOAA responded to a request to clarify the statutory language in the consistency provisions of § 307. NOAA then stated that it was "considering a position which treats the Department of the Interior's pre-lease sale decisions, such as tract selections and choice of lease stipulations, as a 'Federal activity' subject to the requirements of § 307(c)(1) of the Act". 42 Fed.Reg. 43586, 43591 (1977) (comment accompanying second set of proposed regulations). In light of the dispute between Interior and Commerce as to the applicability of the § 307(c)(1) consistency requirements to the OCS leasing process, NOAA refrained from taking a firm position at that time. See 42 Fed.Reg. 43592; 43 Fed.Reg. 10510, 10512 (1978).

NOAA's final regulations in 1978 were based upon a liberal construction of all threshold tests triggering consistency review under § 307. NOAA concluded that § 307(c)(1) (as well as the following subsections) was intended to apply to "all Federal actions which were *capable* of significantly affecting the coastal zone".¹³ 43 Fed.Reg. 10510, 10511 (1978) (emphasis added). Favoring broad inclusion of federal activities in the process of consistency review, NOAA concluded that a federal action would meet the threshold test under § 307 even when cumulative effects are determined to be beneficial.¹⁴ 43 Fed.Reg. 10510, 10519 (1978) (to be codified at 15 C.F.R. §§ 930.10-.145).

The NOAA regulations, as amended in June 1979, reflect the view that pre-leasing activities fall within the purview of § 307(c)(1). 44 Fed.Reg. 37142-43, 37146-47 (1979) (comment to 15 C.F.R. § 930.33 (1979)). In support of its view, NOAA explained that "[i]mplementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environmental and socioeconomic impacts". 44 Fed.Reg. 37142. According to NOAA's comment, "Federal agencies are encouraged to construe liberally the 'directly affecting' test in borderline cases to favor inclusion of Federal activities subject to consistency review". *Id.* at 37146-47.

As recently as April 1980, NOAA reiterated this view. In a letter dated April 9, 1980, addressed to State Coastal Manage-

¹³ As discussed *infra* at p. 1380, the Court, in accord with the opinion letter issued by the Department of Justice, rejects the specific definition promulgated by NOAA in the 1978 regulations, in which a "significantly affecting" test is substituted for the "directly affecting" threshold test of § 307(c)(1). The rejection of NOAA's definition is not intended to imply a rejection of the general position of the agency to whom the Department of Commerce has delegated its functions pursuant to the CZMA. Deference to NOAA's support of a liberal construction of the threshold test does not require the adoption of NOAA's exact language in defining a statutory phrase.

¹⁴ See Schoenbaum & Parker, *supra* note 4, at 231.

ment Program Directors, the Assistant Administrator of NOAA stated its view that "Federal consistency requirements subject final notices of OCS sales to consistency determinations". Ex. L-16.

In sum, NOAA's regulations and the comments thereto consistently supported the application of § 307(c)(1) to final notices of OCS sales. The view of the agency charged with implementing the CZMA, established over a long period of time, is certainly entitled to deference.

Recently, however, NOAA's position has changed abruptly. On May 14, 1981, approximately two weeks after the complaints were filed in the present cases, NOAA published a notice of proposed rulemaking in which it defined "directly affecting". 46 Fed.Reg. 26658, 26659 (1981). The definitions adopted by NOAA represent a complete departure from previous interpretations of the threshold phrase. According to NOAA's newly proposed definition, a federal activity directly affects the coastal zone only "if the Federal agency finds that the conduct of the activity itself produces a measurable physical alteration in the coastal zone or that the activity initiates a chain of events reasonably certain to result in such alteration, without further required agency approval". *Id.* In the comments to this notice, NOAA listed lease issuance as an example of an activity which would not be subject to a consistency determination because it does not directly affect the coastal zone. *Id.* at 26660. On July 2, 1981, NOAA issued its notice of final rulemaking which reiterated the view of the consistency requirements under the CZMA, as first announced less than two months earlier.

The new notice of rulemaking is not entitled to special deference here. The Secretary's negative determination was made more than a year before these regulations were issued. Federal defendants admit that these regulations have "no direct bearing on the validity of the Secretary's interpretation". Federal Defendants' Summary Judgment Memorandum at 32, n. 4. There is the ever-present danger that regulations pro-

posed subsequent to the initiation of the litigation are self-serving; thus, they are generally suspect. As newly proposed regulations at variance with the previous regulations, they do not reflect a well-established agency interpretation. Therefore, a principal rationale supporting deference to the agency is absent. See *Ethyl Corp. v. EPA*, *supra*; cf. *FTC v. Dean Foods Co.*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1966). Also, the Court finds that this newest interpretation is inconsistent with the CZMA's policy of furthering long-range planning for coastal resources. The Court is "not obliged to stand aside and rubber-stamp an administrative position deemed inconsistent with a statutory mandate". *NLRB v. Brown*, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965). Here the position is inconsistent not only with statutory policy, but with the agency's own interpretation during the past four years. Therefore, the Court concludes that although NOAA's longstanding interpretation of the consistency requirements is entitled to deference, NOAA's new interpretation, first proposed in May 1981, is not.

F. Applicability Of Dictionary Definitions

Defendants contend that the phrase directly affects should be construed by reference to the definition of "directly" found in Webster's dictionary. Webster's New International Dictionary (unabridged 3d ed. 1971) provides six alternative definitions for the word "directly":

1. a. without any intervening space or time; next in order; squarely, exactly;
b. in a straight line; without deviation of course, by the shortest way.
2. a. straight on; along a definite course of action without deflection or slackening;
b. purposefully or decidedly and straight to the mark; in a straightforward manner without hesitation, circumlocution, or equivocation; plainly and not by implication; in unmistakable terms; unqualifiedly;
c. without divergence from the source or the original;

- d. simultaneously and exactly or equally.
- 3. in close relational proximity.
- 4. a. without any intervening agency or instrumentality of determining influence; without any intermediate step;
- b. in the exact words of the original; verbatim.
- 5. a. in independent action without any sharing of authority or responsibility;
- b. face-to-face, in person.
- 6. a. without a moment's delay; at once, immediately;
- b. after a little, in a little while, shortly, presently.

According to defendants, the "plain meaning", based upon the dictionary definition, is "effects resulting from an activity without an intervening cause". Federal Defendants' Reply Memorandum in Support of Their Motion for Summary Judgment at 14. Defendants' invocation of the plain meaning rule to support their choice among rival definitions of an inherently vague phrase should not be allowed to cloud the issue. As one commentator has warned, reliance on the plain meaning rule is too often merely "verbal table thumping to reinforce confidence in an interpretation arrived at on other grounds". Sands, 2A Sutherland Statutory Construction, § 46.01 at 49 (3d ed. 1973).¹⁵ Use of the plain meaning label is simply a subterfuge in the present case. Although Webster offers six alternative definitions, defendants ignore four of the six meanings without explanation. Moreover, their choice of phrasing—"effects resulting from an intervening cause"—is not identical to any definition presented by Webster; it merely incorporates a portion of two of the six alternatives.

The defendants' construction of the phrase would produce an unreasonable result. The doctrines of intervening cause and

¹⁵ See also Merz, *The Meaninglessness of the Plain Meaning Rule*, 4 Dayton L. Rev. 31 (1979).

proximate cause are familiar guiding principles in the law of torts, but there is no basis for importing those concepts into the present context. The doctrine of intervening cause was created by the courts to limit the extent of the defendant's liability for damages in tort. W. Prosser, *Law of Torts* § 44 (4th ed. 1971). It has no relevance in construing the CZMA which has the purpose of providing long-term planning for the presentation and management of coastal resources. Where the "plain meaning" would produce a result at odds with the policy of the statute in question, the Court should look to the purpose of the legislation rather than to a definition borrowed from another context. *Trustees of Indiana University v. United States*, 618 F.2d 736 (Ct.Cl.1980). The dictionary definitions advanced by the defendants are clearly contrary to the congressional intent and, if applied, would thwart the objectives of the CZMA. In fact, as they must admit, if the definitions urged by the Secretary and the intervenor defendants were adopted, the issuance of the final notice of lease sale would require a consistency determination only in the rarest case. Such a result would not be in furtherance of the stated policies and goals of the CZMA.

Finally, although not necessary to this decision, it should be noted that if defendants' definition were applied in construing the threshold under § 307(c)(1), the Court need not reach a contrary result. There are cases supporting the view that a lessor may be held liable for activities carried on by the lessee where land was leased for the purpose of carrying on the very activity which caused the harm. *See, e.g., Green v. Asher Coal Mining Co.*, 377 S.W.2d 68 (Ky.1964); *United States v. Morrell*, 331 F.2d 498 (10th Cir. 1964); *Daigle v. Continental Oil Co.*, 277 F.Supp. 875 (W.D.La.1967); *Benton v. Kernan*, 130 N.J.Eq. 193, 21 A.2d 755 (1941). In *Green v. Asher Coal Mining Co.*, *supra*, the court held that the owner of land leased for strip mining purposes could be held liable for injury arising out of the acts of the lessee. The court reasoned that an owner cannot escape liability by showing that he did not personally create the condition or commit the wrongful act, if the expected operations under the lease result in an injury that might

have been reasonably anticipated. *Id.* at 72. Similarly, in *Daigle v. Continental Oil Co.*, *supra*, a lessor of land on which the carbon black plant of lessee was located was held liable to adjacent property owners for damage caused by emission of carbon black and coke dust from the plant.

In these cases, the parties did not frame their arguments in terms of intervening cause. The results, however, comport with a finding of no intervening cause.¹⁶ The cases stand for the proposition that the lessor is not automatically relieved of liability for activities conducted by his lessee; that is, the lessee's involvement in the tortious conduct does not necessarily constitute intervening cause. Therefore, pre-leasing activities could have direct effects even if "direct" is defined on the basis of tort concepts. Defendants cannot deny that leasing activities have consequences in the coastal zone by pointing to a series of events which occur after the leases are issued, but before the actual effects are realized. The lessor of vast tracts in the OCS where sizeable oil reserves have been estimated to exist "reasonably anticipates" effects in the coastal zone as a result of oil exploration, development, and production to be conducted by the lessees. The reasonable anticipation of these effects is obvious.

¹⁶ As defined in Black's Law Dictionary (5th ed. 1979),

The "intervening cause," which will relieve of liability for an injury, is an independent cause which intervenes between the original wrongful act or omission and the injury, turns aside the natural sequence of events, and produces a result which would not otherwise have followed and *which could not have been reasonably anticipated*. (Emphasis added).

Thus, when the court in *Green v. Asher Coal Mining Co.*, 377 S.W.2d 68 (Ky.1964), employed the phrase "reasonably anticipated" in describing the causal connection between the leasing and the injury for which the lessor could be held liable, the court in effect concluded that none of the events subsequent to the leasing constituted intervening cause. *Id.* at 72.

G. The Opinion Letter Of The Department Of Justice

In construing the ambiguous language within § 307(c)(1), the Court must also give serious consideration to the opinion letter written by the Department of Justice on April 20, 1979. Ex. L-A. Cf. *Train v. NRDC*, 421 U.S. 60, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1974). The Department of Interior, charged with administering leasing activities in the OCS, and the Department of Commerce, responsible for the approval of state coastal management programs under the CZMA, disagreed as to the applicability of the consistency requirements of § 307(c)(1) to the OCS pre-leasing activities of the Secretary of the Interior. In its opinion letter, the Department of Justice expressly repudiated Interior's contention that its pre-lease activities were *per se* exempt from the consistency requirement of § 307(c)(1). After analyzing the legislative history, the interrelationship of two of the consistency provisions, and the significance of subsequent legislation concerning the OCS, the Department of Justice concluded that "pre-leasing activities of the Secretary of Interior are subject to the conformity requirement of § 307(c)(1)". Ex. L-A at 13. Thus, the opinion lends further support to the Court's interpretation of the scope of the requirement in light of the legislative history and purpose of the statute.

The opinion letter does not attempt to resolve the problem of the proper definition of the phrase "directly affects". However, it does reject the substitution of the term "significantly" for the statutory term "directly". In the view of the Department of Justice, the legislative history does not justify this substitution. The Court concurs in this view.

The opinion did not reach the question whether the particular lease sale out of which the dispute arose¹⁷ did directly affect

¹⁷ The dispute arose out of Lease Sale No. 48 involving 148 OCS tracts off southern California. The lease sale was held on June 29, 1979. Ex. L-27 (Summary of Mediation Conference between Califor-

the coastal zone. According to the Department of Justice, the question whether particular pre-leasing activities affect the coastal zone is one of fact and thus the Department was not authorized to answer the question. Ex. L-A.

H. The Direct Effects Of Lease Sale No. 53

Although the Court is convinced that a final notice of lease sale would invariably directly affect the coastal zone in all but the most unusual case—a case which probably could only be posed as a hypothetical—it declines to hold that the final notice of lease sale is a generic category of federal activity which directly affects the coastal zone within the meaning of 307(c)(1). The Court agrees with the Justice Department that the determination as to whether the final notice of lease sale directly affects the coastal zone must be made on a case-by-case basis.

On these facts, the Court has no difficulty in finding such a direct effect. There is ample evidence within the administrative record that the Notice of Lease Sale No. 53 directly affects the coastal zone and, thus, satisfies the threshold test under § 307 of the CZMA.

For example, a reading of the notice itself reveals some of the many consequences of leasing upon the coastal zone. The "Notice of Oil and Gas Lease Sale No. 53 (Partial Offering)", as published in the Federal Register,¹⁸ announced ten stipulations to be applied to federal lessees. The activities permitted and/or required by the stipulations result in direct effects upon the coastal zone. Stipulation No. 4 sets forth the conditions for operation of boats and aircraft by lessees. Stipulation No. 6 states the conditions under which pipelines will be required;

nia and the Department of Interior, Oct. 19, 1979); Ex. L-7 (Mediator's Memorandum for the Secretary of Commerce, Jan. 25, 1980); see also Linsley, *supra* note 2 at 454-461.

¹⁸ 46 Fed.Reg. 23674 (1981), Ex. L-4.

the Department of Interior, as lessor, specifically reserves the right to regulate the placement of "any pipeline used for transporting production to shore". Lessees must agree, pursuant to Stipulation No. 1, to preserve and protect biological resources discovered during the conduct of operations on the leased area.

The Secretarial Issue Document ("SID"), prepared in October 1980 by the Department of Interior to aid the Secretary in his decision, contains voluminous information indicative of the direct effects of this project on the coastal zone. For instance, the SID contains a table showing the overall probability of an oilspill impacting a point within the sea otter range during the life of the project in the northern portion of the Santa Maria Basin to be 52%.¹⁹ Both the SID and the EIS contain statistics showing the likelihood of oilspills during the life of the leases; based on the unrevised USGS estimates, 1.65 spills are expected during the project conducted in the Santa Maria sub-area. *See* SID at 190; *see also* EIS at 4-1 to 4-16. According to the SID, the probability of an oilspill is even higher when the revised USGS figures are utilized.

In addition, both the SID and the EIS list a multitude of impacts arising out of the operations in the leasing area of Lease Sale No. 3. The EIS, prepared by the BLM at the request of the Department of the Interior, includes a section entitled "Unavoidable Adverse Impacts"; the SID discusses the same factors under the caption "Multiple-Use Conflicts". Disregarding the titles, the information contained in these sections is indicative of the consequences flowing from the

¹⁹ *See* Table 3 in FWS letter of September 18, 1980, appended to SID, Ex. L-C at 205. This figure represents the overall probability that one or more oilspills of 1,000 barrels or more will occur during the lifetime of the project and impact designated targets within 30 days. The FWS considers the data concerning the impact upon the sea otter range within 30 days to be the "primary data that should be considered when assessing possible effects on sea otters". Ex. L-C at 189.

Notice of Lease Sale 53 to the coastal zone. Both documents refer to impacts upon air and water quality, marine and coastal ecosystems, commercial fisheries, recreation and sportfishing, navigation, cultural resources, and socio-economic factors. EIS at 4-183 to 4-186; SID 80-132. For instance, the EIS states that "[n]ormal offshore operations would have unavoidable effects . . . on the quality of the surrounding water". Pipelaying, drilling, and construction, chronic spills from platforms, and the discharge of treated sewage contribute to the degradation of water quality in the area. EIS at 4-183. As to commercial fisheries, drilling muds and cuttings "could significantly affect fish and invertebrate populations"; the spot prawn fishery in the Santa Maria Basin is particularly vulnerable to this physical disruption. EIS at 4-184. In reference to recreation and sportfishing, the EIS indicates the possibility of adverse impacts as a result of the competition for land between recreation and OCS-related onshore facilities as a result of the temporary disruption of recreation areas caused by pipeline burial. EIS at 4-184 to 4-185. There are the additional risks of "the degradation of the aesthetic environment conducive to recreation and the damage to recreational sites as a result of an oil spill". EIS at 4-185. Another impact on the coastal zone will occur as a result of the migration of labor into the area during the early years of oil and gas operations. EIS at 4-185. Another impact on the coastal zone will occur as a result of the migration of labor into the area during the early years of oil and gas operations. EIS at 4-185. Impacts on the level of employment and the size of the population in the coastal region are also predicted. EIS at 4-54.

The SID notes that there are artifacts of historic interest as well as aboriginal archaeological sites reported in the area of the Santa Maria tracts. SID at 119. The FWS and NMFS biological opinions, appended to the SID, indicate the likelihood that development and production activities may jeopardize the existence of the southern sea otter and the gray whale. SID at 146.

These effects constitute only a partial list. Further enumeration is unnecessary. The threshold test under § 307(c)(1) would

in fact be satisfied by a finding of a single direct effect upon the coastal zone. Although the evidence of direct effects is substantial, such a showing is not required by the CZMA. It is manifest that a consistency review is required in this case.

III. NEPA

Plaintiffs also seek to enjoin the leasing of tracts in the northern portion of the Santa Maria Basin on the basis of the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4331 *et seq.* They allege that defendants have failed to comply with § 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), which requires federal agencies to prepare and to circulate an environmental impact statement ("EIS") for major federal actions significantly affecting the quality of the human environment. Plaintiffs challenge the adequacy of the EIS prepared for Lease Sale No. 53 because the EIS failed to incorporate the most recent estimates of oil and gas reserves in the basin. Due to the alleged failure of the EIS to consider the newest data concerning the estimated hydrocarbon reserves, plaintiffs contend that a supplemental EIS is required by NEPA.

In September 1980, the final EIS on Lease Sale No. 53 was released by the Bureau of Land Management ("BLM"). The evaluation of environmental effects of Lease Sale No. 53 was based upon existing estimates of recoverable oil and gas resources, provided by the United States Geological Survey ("USGS"), Conservation Division, Los Angeles, California. At page xii of the EIS is an Addendum which presents the revised estimates of oil and gas resources for the five basins involved in Lease Sale No. 53, as of August 28, 1980. The expected recoverable resources were found to be "roughly twice the amount assumed in the draft and final EIS analyses". EIS at xii. The evaluations in the body of the EIS are based upon the original USGS estimates of reserves, rather than one on the more recent statistics. A Secretary Issue Document ("SID"), prepared in October 1980 for then Secretary Andrus did, however, incorporate the revised USGS estimates.

The central issue to be resolved is whether the EIS filed by the BLM concerning proposed Lease Sale No. 53 was adequate according to procedures set forth in the National Environmental Protection Act. In evaluating the procedural adequacy of the EIS, the Court is guided by the standard applied by this circuit:

[A]n EIS is in compliance with NEPA when its form, content, and preparation substantially (1) provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in the light of its environmental consequences, and (2) make available to the public, information of the proposed project's environmental impact and encourage public participation in the development of that information. [Citation omitted]

Columbia Basin Land Protection Association v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981). The adequacy of the content of the EIS is determined by a rule of reason, which requires only "[a] reasonably thorough discussion of the significant aspects of the probable environmental consequences". *Id.*, quoting *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974). As the Ninth Circuit has cautioned, there is no *per se* rule requiring the inclusion of every potentially significant statistic. See *Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1217 (9th Cir. 1979). Rather, "the test of EIS adequacy is pragmatic and the document will be examined to see if there has been a good faith attempt to identify and to discuss all foreseeable environmental consequences". *Columbia Basin Land Protection Association v. Schlesinger*, *supra*, at 592, quoting *Warm Springs Dam Task Force v. Gribble*, 565 F.2d 549, 552 (9th Cir. 1977) (*per curiam*).

The sole procedural defect of which plaintiffs complain is the failure of defendants to incorporate the USGS revised estimates in the discussion of environmental effects in the EIS. At the outset, it must be noted that defendants did not completely ignore the new estimates. The revised USGS estimates were clearly presented in an addendum at p. xii which preceded the main body of the EIS. Thus, it cannot be said that this information was not made available to the public.

Also, the EIS did point out the "high degree of uncertainty regarding the level of oil and gas reserves which might be present". EIS 1-12. The unrevised USGS estimate which predicts an initial yield of 400 million barrels for the Santa Maria Basin, is described as a "conditional probability". EIS 1-9, 1-11. Thus, the EIS does not disguise the fact that estimates of oil reserves, which form the basis of the predictions of a variety of environmental impacts, are "inherently speculative". EIS 1-13. Thus, this preliminary explanation of the reliability of estimates of hydrocarbon reserves serves as evidence of a "good faith attempt" to discuss foreseeable environmental consequences.

Perhaps, as plaintiffs suggest, detailed analysis of this new data, incorporated in the body of the EIS, would be more effective in informing the public of the potential risk posed to the environment. However, the format selected for the presentation of the information is left to the discretion of the federal agency. The Court's role is to ensure that the agency has taken a "hard look" at the environmental consequences, *Kleppe v. Sierra Club*, 427 U.S. 390, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976), and not to prescribe in detail the method by which the agency conveys this information to the public.

Assuming for the purpose of argument that the EIS was inadequate, according to the procedures set forth in NEPA, defendants argue that the SID has cured this alleged inadequacy. The SID, prepared a month after the EIS, presented the revised USGS figures and analyzed certain environmental impacts on the basis of the current estimates. SID at 1, 59. While the SID comments that the revised USGS estimates, which "indicate significantly higher resources for oil and gas", result in "higher environmental cost estimates", *Id.* at 1, it is not clear that the SID's limited analysis of the revised figures sufficiently clarifies the issues raised by the prediction doubling the estimated hydrocarbon reserves. Nevertheless, the Court need not reach the question whether the SID alone would cure the alleged defect. Although the SID may not be sufficient in itself to remedy the omission of significant data,

the document is likely to be helpful as a complement to the EIS by interpreting or clarifying issues raised in the EIS. *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C.Cir.1980).

Under the facts of this case, the Department of Interior's actions in filing the EIS with an addendum presenting the newly revised estimates of hydrocarbon reserves, in addition to preparing an SID which analyzes certain impacts in light of the new data, comport with NEPA. Due to the high degree of uncertainty regarding the estimates of hydrocarbon reserves in the Santa Maria Basin, the decision of the Department of Interior not to file a supplement or to revise the existing EIS in the few days remaining before publication is not unreasonable. The Court concludes that "although the EIS could be 'improved by hindsight,' it has satisfied the intent" of NEPA. *Cady v. Morton*, 527 F.2d 786, 797 (9th Cir. 1975), quoting *National Forest Preservation Group v. Butz*, 485 F.2d 408, 412 (9th Cir. 1973).

IV. SECTION 19 OF THE OUTER CONTINENTAL SHELF LANDS ACT

A third claim for injunctive and declaratory relief is premised on the Secretary's alleged violation of § 19 of the Outer Continental Shelf Lands Act ("OCSLA"). 43 U.S.C. § 1345. Section 19 provides that the governor of an affected state may submit recommendations to the Secretary regarding the size, time or location of a proposed lease sale, 43 U.S.C. § 1345(a), and that the Secretary is required to accept the governor's recommendations "if he determines . . . that they provide for a reasonable balance between the national interest and the well-being of the citizens of the affected State". 43 U.S.C. § 1345(c). Plaintiffs contend that the Secretary's decision to reject Governor Brown's recommendation to delete the tracts in dispute from Lease Sale No. 53 fails to comply with § 19. According to plaintiffs, since the Governor's recommendation provided for a "reasonable balance" as required by § 19, the Secretary was obligated to accept the recommendation.

In deciding whether the Secretary's decision to proceed with Lease Sale No. 53 complies with § 19 of OCSLA, the scope of the court's inquiry is limited by the deferential standard of review applicable to this determination. *See, e.g., Ethyl Corp. v. EPA*, 176 U.S.App.D.C. 373, 541 F.2d 1 (D.C.Cir.1976). The statute itself provides that the Secretary's acceptance or rejection of such recommendations shall be final, "unless found to be arbitrary or capricious". 43 U.S.C. § 1345(d). In determining whether the Secretary's rejection of the Governor's recommendations was arbitrary or capricious, the Court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 823, 28 L.Ed.2d 136 (1971), quoted in *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285, 95 S.Ct. 438, 441, 42 L.Ed.2d 447 (1974); *Washington State Farm Bureau v. Marshall*, 625 F.2d 296 (9th Cir. 1980). The Court may not substitute its judgment for that of the agency.

In the present case, the record shows that the Secretary did undertake an examination of the balance between the interests at stake in Lease Sale No. 53. In a letter subsequently mailed to the Governor, the Secretary described the mode of analysis employed in the Secretary's balancing process. Defendants' Ex. L-P (letter from Secretary Watt to Governor Brown, dated May 1, 1981). This explanation indicates that the Secretary evaluated such "quantifiable factors" as income from resource development and expected monetary losses due to oil spills. Factors which, in the Secretary's view, were "not quantifiable", including damage to wildlife, decline in water quality, and "aesthetic and lifestyle losses", were given only cursory consideration. A thorough evaluation of all relevant factors through more sophisticated analytical techniques would certainly have been desirable, but within wide limits, the final decision as to the type of analysis which is appropriate in view of the available data must be the agency, subject to review only for obvious errors of methodology. *Massachusetts v. Andrus*,

594 F.2d 872, 886 (1st Cir. 1979). Under the applicable standard of review, the Court cannot conclude that there has been a clear error of judgment.

The Secretary's mode of analysis must also be considered in light of the fact that OCSLA provides little or no guidance as to the proper basis for the Secretary's evaluation of a governor's recommendation. In deciding whether to accept or reject the Governor's recommendation, the Secretary must determine whether it provides for a "reasonable balance" of two key factors—the "national interest" and the "well-being of the citizens of the affected State". 43 U.S.C. § 1345(c). Section 19 requires that the determination of the "national interest" be based on "the desirability of obtaining oil and gas supplies in a balanced manner", but provides no basis for evaluating the citizens' well-being. *Id.*

Nevertheless, the fact that the statute fails to provide explicit guidance will not excuse the absence of reasoned analysis of all considerations specified within the Act. The Court has a responsibility to scrutinize an agency's judgment as to the proper balance to be struck between conflicting interests. *NLRB v. Brown*, 380 U.S. 278, 85 S.Ct. 980, 13 L.Ed.2d 839 (1965). Here, the Secretary's extremely limited consideration of one of two potentially conflicting interests, the "well-being of the citizens of the affected State", barely suffices to meet the plaintiffs' challenge.

Plaintiffs also point to purported procedural flaws in the Secretary's determination pursuant to § 19. First, plaintiffs complain of a lack of opportunity for consultation. The statute imposes the responsibility on the Secretary for the provision of such an opportunity. 43 U.S.C. § 1345(c). However, the timing of the opportunity and the mode of making consultation available is within the Secretary's discretion. The record indicates the existence of limited formal correspondence between the parties, including Governor Brown's letter of December 24, 1980, and Secretary Watt's letter of February 10, 1981. Although minimal communication in writing is not conducive to

meaningful consultation between the Secretary and the Governor, it nevertheless meets the bare technical requirements of the statute. In sum, there is an insufficient basis for the conclusion that the Secretary arbitrarily and capriciously deprived the Governor of further opportunities for consultation.

A second alleged procedural flaw relates to the requirement that the Secretary communicate to the Governor in writing his reasons for rejecting the recommendation. 43 U.S.C. § 1345(c). The Secretary's letter to Governor Brown, dated May 1, satisfies this requirement. The statute does not require that the written explanation be provided prior to the Secretary's announcement of his decision to proceed with the lease sale. Although the provision of a timely explanation is likely to be more effective in implementing the statutory policy of insuring governors of affected states a "leading role in OCS decisions",²⁰ H.Conf.Rep. 95-1474, 95th Cong., 2d Sess. 106, *reprinted in* [1978] U.S.Code Cong. & Ad.News 1674; H.R.Rep. 95-590, 95th Cong., 2d Sess. 152, *reprinted in* [1978] U.S.Code Cong. & Ad.News 1558, the Court cannot substitute its judgment for that of Congress by imposing a requirement concerning the timing of the explanation.

There is one further aspect of the timing of the explanation which requires comment. Because the Secretary's reasons for his decision were committed to writing 21 days after the announcement of the decision and 2 days after this suit was filed alleging a failure to provide an adequate rationale for the rejection of the Governor's recommendation, the Secretary's explanation is subject to the inherent danger of "*post hoc*

²⁰ Section 19 is "intended to insure that Governors of affected States, and local government executives within such States, have a leading role in OCS decisions and particularly as to lease sales and development and production plans. In addition, it is intended to provide a mechanism for involvement of Governors and local government officials". H.Rep. 95-590, 95th Cong., 2d Sess. 152, *reprinted in* [1978] U.S.Code Cong. & Ad.News 1558.

rationalization". See *Overton Park v. Volpe*, *supra*, 401 U.S. at 419-20, 91 S.Ct. at 825; *American Petroleum Institute v. Knecht*, *supra*, at 908-9. An explanation which takes on the aspect of a litigation affidavit must, of course, be viewed critically. *Id.* However, the danger presented by *post hoc* explanations may be less where, as here, the announced agency decision was accompanied by a contemporaneous explanation of some of the considerations that formed a basis of the decision,²¹ and where the administrative record lends some support to the explanation. See *Camp v. Pitts*, 411 U.S. 138, 93 S.Ct. 1241, 36 L.Ed.2d 106 (1973) (*per curiam*). That is the best that can be said for the Secretary's timing.

Taking into consideration all of the foregoing factors, the Court must conclude that the Secretary has complied, although minimally, with the necessary procedural requirements under § 19 of OCSLA. 43 U.S.C. § 1345. Although the Secretary quite clearly violated the spirit of the Act, giving due deference to his judgment, it cannot be said that his determination to reject the recommendation submitted by Governor Brown was legally "arbitrary and capricious".

²¹ On April 10, 1981 at 10:00 a.m., the Department of Interior issued a news release, discussing generally the accelerated five-year offshore leasing plan proposed by the Department of Interior. Included in the New Release is a brief discussion of Lease Sale No. 53, in which some of the interests "balanced" by the Secretary are noted.

Defendants have questioned the propriety of considering information contained in documents which do not form a part of the administrative record. The Ninth Circuit has concluded that where the court finds it necessary to go outside the administrative record, it may consider such evidence "to ascertain whether the agency considered all the relevant factors or fully explicated its course of conduct or grounds of decision". *Asarco, Inc. v. EPA*, 616 F.2d 1153 (9th Cir. 1980). Under this analysis, it is proper to consider the press release in evaluating the danger of *post hoc* rationalization in the Secretary's course of action, described *supra*.

V. ENDANGERED SPECIES ACT

As a fourth ground of relief, plaintiffs allege that defendants have violated the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 *et seq.*, which directs federal agencies "to conserve endangered and threatened species". 16 U.S.C. § 1531(c). Section 7(a) of the Act requires each federal agency to "insure" that an action by that agency "does not jeopardize the existence of any endangered species or threatened species . . ." 16 U.S.C. § 1536(a)(2). In order to facilitate compliance with this requirement, the Act imposes on the Secretary and any agency whose actions may affect an endangered or threatened species the duty of "consultation".²² Section 7(c)(1), 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.04 (1980). Section 7(c)(1) provides:

To facilitate compliance with the requirements of subsection (a)(2) of this section, each Federal agency shall . . . request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action.

In fulfilling the consultation requirement of Section 7(c), the agency is required to "use the best scientific . . . data available". *Id.*

During April of 1980, the BLM requested biological opinions from the two federal agencies with jurisdiction over the marine animals which it had determined were likely to be affected by the proposed lease sale. In response to this request, the Na-

²² The implementing regulations under § 7 of ESA provide for formal consultation with one or both of two agencies which share responsibilities under the ESA; these agencies are the United States Fish & Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS"). 50 C.F.R. §§ 402.01, 402.04.

tional Marine and Fisheries Service ("NMFS") prepared a biological opinion on the impact of the lease sale on various species of whales and sea turtles, and the Fish and Wildlife Service ("FWS") prepared a biological opinion on the impact of the lease sale on the southern sea otter and other species of wildlife. Ex. L-5 (FWS Opinion), Ex. L-6 (NMFS Opinion). Both opinions concluded that the proposed lease sale and exploration activities associated with Lease Sale No. 53 were not likely to jeopardize any endangered or threatened species. *Id.*

Plaintiffs challenge the adequacy of the two biological opinions. First, plaintiffs claim that, in failing to reappraise the risks posed by leasing activities and exploratory drilling in light of the revised USGS resource estimates, defendants have not employed "the best scientific data available". Secondly, according to plaintiffs, biological opinions which fail to evaluate the risks at the development and production stages cannot provide an adequate basis for a finding of no jeopardy.

The short answer to plaintiffs' expressed concern that defendants did not utilize the newest information as to the revised oil reserve estimates is simply that the agencies which prepared the biological opinions did evaluate the risks posed to endangered or threatened species in light of that data. The FWS opinion discussed the significance of the revised USGS resource estimates in its analysis of the cumulative effects upon sea otters as the result of an oil spill, and explicitly stated that its findings were based on "the new oilspill analysis data of August 28, 1980". Ex. L-5 at 9-11. The NMFS opinion was drafted before the NMFS became aware of the revised estimates of hydrocarbon potential. However, upon consideration of the revised estimates, the NMFS concluded that there was "no increased risk to marine mammals and endangered species" during the leasing and exploration stages and, therefore, no modification of the biological opinion prepared for Lease Sale No. 53 was required. Declaration of James H. Lecky.²³

²³James H. Lecky, as Marine Mammal and Endangered Species Coordinator for the Southwest Region, NMFS, was responsible for

Any question as to the extent of the consideration given the revised resource estimates is beyond the proper scope of review. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, *supra*, 401 U.S. at 416, 91 S.Ct. at 823. Since there is evidence of consideration of the new USGS data, the Court must conclude that the consultation was based upon the "best scientific information available" as required by § 7 of ESA.

The potential risks that may be incurred during the development and production phases were not ignored during the consultation process. In fact, the FWS opinion acknowledges that potential development/production-related facilities could have an effect on endangered and threatened species. Ex. L-5 at 3. Since the specific location, nature, and size of facilities that might be necessary during these phases is not yet known, the potential jeopardy to the endangered species posed by these subsequent phases of OCS development was not determined. *Id.*; Ex. L-6 at 4. Both opinions indicated, however, the necessity of reinitiation of consultation pursuant to § 7 of ESA prior to approval of development/production plans. *Id.* In light of the restrictions imposed on the FWS and the NMFS by the limited quantity of available information, the decision to evaluate only the risks incurred during leasing and exploration and to reinitiate consultation prior to development and production cannot be held unreasonable. See *North Slope v. Andrus*, *supra*, at 606-609, and *Conservation Law Foundation v. Andrus*, 623 F.2d 712, 715 nn.2-3, 14 [BNA] E.R.C. 1049, 1050-51 and nn. 2-3 (1st Cir. 1979); but see *Hill v. TVA*, 549 F.2d 1064, 1070-72 (6th Cir. 1977), *aff'd*, 437 U.S. 153, 98 S.Ct. 478, 54 L.Ed.2d 312 (1978).

Plaintiffs allege a violation of another section of the ESA, § 7(d), which provides that a federal agency "shall make no irretrievable commitment of resources . . . which has the ef-

the preparation of the biological opinion which NMFS submitted to BLM on September 17, 1980.

fect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures" which would avoid jeopardizing the existence of any endangered or threatened species. 16 U.S.C. § 1536(d). Plaintiffs have not demonstrated that such an irreversible or irretrievable commitment of resources has occurred as a result of the activities thus far approved during § 7 consultation. Although not yet addressed by the Ninth Circuit, two other circuits have rejected similar arguments to the effect that an OCS sale constitutes an "irreversible or irretrievable commitment of resources" within the meaning of § 7(d). *North Slope v. Andrus*, *supra*; *Conservation Law Foundation v. Andrus*, *supra*.

VI. "TAKING" UNDER § 9 OF THE ENDANGERED SPECIES ACT AND UNDER THE MARINE MAMMAL PROTECTION ACT

Plaintiffs' final claim arises under § 9 of ESA, 16 U.S.C. § 1538, and under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.* They argue that a "taking" under § 9 of ESA and under the MMPA will result from the leasing of tracts in the northern Santa Maria Basin. The defendants' activities relating to Lease Sale No. 53 are not encompassed by the prohibitions of either § 9 of ESA or the MMPA.

The language of the statutes provides no support for plaintiffs' arguments. The statutes forbid any person to "take" any marine mammal or endangered species of fish or wildlife from waters within the jurisdiction of the United States. 16 U.S.C. § 1372(a)(1); 16 U.S.C. § 1538(a)(1). Assuming *arguendo* that the proposed leasing activities do constitute a threat to the continued survival of species protected by these statutes, such a threat would still not constitute a "taking" under the statutes. ESA defines the term "take" as meaning "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct". 16 U.S.C. § 1532(19). Thus, in prohibiting "taking", the draftsmen of the

statutes envisioned a more immediate injury. *Cf. Palila v. Hawaii Dept. of Land & Natural Resources*, 471 F.Supp. 985 (D.Hawaii 1979). A review of the record reveals no clear showing of such harm, attempted harm, or harassment²⁴ as is required by the statutes. Plaintiffs have not demonstrated that defendants' activities relating to Lease Sale No. 53 are encompassed by § 9 of ESA or by the MMPA.

VII. THE PROPER SCOPE OF ANALYSIS UNDER ESA, THE MMPA AND THE CZMA.

A question common to three of the statutes relied upon by plaintiffs—ESA, the MMPA and the CZMA—is whether the Court should focus on a discrete stage of a multistage OCS project designed to exploit and develop the mineral resources of the OCS or whether the Court should examine the project as a continuum of planned events. That is, in analyzing plaintiffs' claims under the different environmental statutes, should the Court look at Lease Sale No. 53 merely as the first discrete link in the chain or should the Court consider the lease sale by reference to the complete chain of events which it initiates? The answer to this question cannot be the same for all of the statutes involved here. To determine the proper scope of analysis, the Court must look to the policy behind the statute.

The CZMA, as discussed *supra*, is intended to further the development and implementation of comprehensive management programs for the coastal area. The needs of present and future generations are to be considered during the planning process envisioned by Congress. Under the CZMA, a myopic view of an isolated phase of a multistage project would be inappropriate. The decision-makers must integrate the full

²⁴ The regulations of the Fish and Wildlife Service further define "harass" as "an intentional or negligent act or omission . . . annoying wildlife to such an extent as to significantly disrupt normal behavior patterns. . . ." 50 C.F.R. § 17.3. There is no evidence in the record to support such a finding of harassment.

panopoly of possibilities into a comprehensive plan. Thus, the states and the federal agencies must consider long-term effects as well as immediate effects in order to manage the coastal zone effectively. It would be unrealistic to declare that the goal of Lease Sale No. 53 is merely leasing tracts and not "pumping oil". See *North Slope Borough v. Andrus*, *supra*, at 608. The CZMA requires an evaluation of the consequences of the lease sale as well as the resulting activities occurring as a result of the notice of sale.

In contrast, ESA and the MMPA have a narrower focus. ESA, like the CZMA, is intended to serve the goal of preservation of fragile environmental resources. In the case of ESA, the protected resource is the species threatened with extinction, whereas, under the CZMA, all coastal resources are to be protected to accomplish the goal of preservation. ESA relies on different means from those of the CZMA. ESA does not focus on comprehensive planning. Instead, it prescribes safeguards, such as specific prohibitions on particular acts, such as killing or wounding an endangered species of fish or wildlife. *Sierra Club v. Froehlke*, 534 F.2d 1289 (8th Cir. 1976). Under ESA, the Secretary is required to make individual determinations as events arise concerning the risk posed to a threatened or endangered species by a particular action. It may not be feasible to prescribe the proper safeguards until the discrete stage is at hand. Thus, a more limited focus is appropriate under ESA. The same distinction applies to the MMPA as opposed to the CZMA. The MMPA prescribes specific safeguards in order to prevent imminent harm or harassment of marine mammals; it provides restrictions on the "taking" and importing of certain species of marine mammals, and provides for enforcement of the restrictions. 16 U.S.C. §§ 1371-1377. A focus on a discrete stage of activity is also appropriate to effectuate the purpose of the MMPA just as it is with respect to the ESA. In sum, in this case, an examination of the threat posed by specific activities at the time the immediate threat is posed will carry out the objectives of the MMPA and ESA.

CONCLUSION

Plaintiffs are entitled to injunctive and declaratory relief on their claims under the CZMA. As to the remaining claims raised in the Complaint, defendants are entitled to judgment as a matter of law.

This Opinion shall constitute the Court's Findings of Fact and Conclusions of Law.

ORDER AND SUMMARY JUDGMENT

The parties' cross-motions for summary judgment, pursuant to Fed.R.Civ.P. 56, and defendant-intervenors' motion for summary judgment, or, in the alternative, motion to dismiss the complaints of Natural Resources Defense Council, *et al.*, and of the County of Humboldt, *et al.*, pursuant to Fed.R.Civ.P. 12(b)(6), came on for hearing before the Honorable Mariana R. Pfaelzer on July 10, 1981. All parties appeared by and through their respective counsel of record. Having reviewed and considered the administrative record and the memoranda, affidavits, and exhibits filed by the parties, and having heard and considered the oral arguments of counsel, and having taken the matter under submission, the Court has incorporated its Findings of Fact and Conclusions of Law in the Opinion filed herewith. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that:

1. Plaintiffs' Motion for Summary Judgment in CV 81-2080, with respect to the claim arising under the Coastal Zone Management Act, 16 U.S.C. §§ 1451 *et seq.*, is granted. Defendants' Motion for Summary Judgment with respect to plaintiffs' claim arising under the Coastal Zone Management Act is denied.

2. Defendants' decision to lease Tracts 129 to 142, 144 to 146, 148 to 155 and 158 to 161 in the northern portion of the Santa Maria Basin for oil and gas development was made in violation of the Coastal Zone Management Act.

3. Any bids received for the tracts at issue are declared null and void and the monies posted shall be returned to the bidders.

4. Any oil and gas leases for any of the tracts at issue herein awarded as part of Lease Sale No. 53 are declared null and void.

5. Defendants and defendant-intervenors, their officers, agents, employees, representatives, and all persons acting in concert with them, are hereby enjoined from awarding, approving or taking any action or allowing others to take any action pursuant to any leases for any of the tracts at issue, until such time as defendants comply with the requirements of the Coastal Zone Management Act by conducting a consistency determination on the tracts at issue and by conducting all activities on these tracts in a manner consistent with California's Coastal Management Plan.

6. Defendants' Motion for Summary Judgment in CV 81-2080 with respect to plaintiffs' claims arising under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.*, the National Environmental Protection Act, 42 U.S.C. §§ 4321 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Marine Mammal Protection Act, 16 U.S.C. §§ 1361 *et seq.*, is granted. Plaintiffs' Motion for Summary Judgment in CV 81-2080 with respect to the claims arising under these statutes is denied.

7. Defendant-intervenors' Motion to Dismiss Plaintiffs, Natural Resources Defense Council, *et al.*, in CV 81-2081 pursuant to Fed.R.Civ.P. 12(b)(6) is granted.

8. Defendant-intervenors' Motion to Dismiss Plaintiff-intervenors, County of Humboldt, *et al.*, in CV 81-2080 pursuant to Fed.R.Civ.P. 12(b)(6) is denied.

9. Each party shall bear its own costs.

10. Judgment is hereby entered.

The Court shall retain continuing jurisdiction over this case to ensure compliance with this Order.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 81-5699, 81-5700,
81-5701, 81,5811,
81-5812, 81-5813,
81-5814, 81-5815,
81-5720, 81-5822.

DC CV 81-2080, 81-2081 MRP

THE STATE OF CALIFORNIA, acting by and through
GOVERNOR EDMUND G. BROWN, JR., *et al.*,
Plaintiffs-Appellees,

v.

JAMES G. WATT, as Secretary of the Interior, *et al.*,
Defendants,
WESTERN OIL AND GAS ASSOCIATION,
a regional trade association, *et al.*,
Defendants-in-Intervention/Appellants.

APPEAL from the United States District Court for the
District of California.

THIS CAUSE came on to be heard on the Transcript of the
Record from the United States District Court for the Central
District of California, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here
ordered and adjudged by this Court, that the judgment of the
said District Court in this Cause be, and hereby is affirmed in
part, reversed in part, vacated in part, and stayed in part.

Filed and entered August 12, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 81-5699, 81-5700,
81-5701, 81-5720,
81-5811, 81-5812,
81-5813, 81-5814,
81-5815, 81-5822.

THE STATE OF CALIFORNIA, *et al.*,
Appellees/Cross-Appellants,
v.
JAMES G. WATT, *et al.*,
Appellants/Cross-Appellees.

ORDER

Before: SNEED, TANG, and PREGERSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petitions for rehearing and to reject the suggestions for rehearing en banc.

The full court has been advised of the suggestions for en banc rehearing, and no judge of the court has requested a vote on the suggestions. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

FILED

Nov. 10, 1982

Phillip B. Winberry

Clerk, U.S. Court of Appeals

Nos. 82-1326 and 82-1327

IN THE

Supreme Court of the United States

October Term, 1982

JAMES G. WATT, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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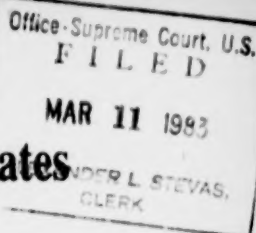
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Question Presented.

Whether the lower courts properly determined that Outer Continental Shelf Lease Sale 53, which established the basic scope and chapter for subsequent oil and gas development in an area adjacent to the California coastal zone, is a federal activity "directly affecting" that zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when that determination was supported by the purposes and legislative history, of that provision and its longstanding interpretation by the federal agency charged with administering the Act.

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Nos. 82-1326 and 82-1327

IN THE

Supreme Court of the United States

October Term, 1982

JAMES G. WATT, *et al.*,

Petitioners,

vs.

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WESTERN OIL AND GAS ASSOCIATION, *et al.*,

Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,

Respondents.

**BRIEF IN OPPOSITION TO PETITIONS FOR
WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT.**

Statement of the Case.

This case involves the question of whether a federal oil and gas lease sale on the Outer Continental Shelf (OCS), Lease Sale 53, "directly affects" California's coastal zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972 (CZMA), 16 U.S.C. §§ 1451, *et seq.*, thereby triggering the requirement of that section that the Department of the Interior conduct a consistency determination to ensure that the lease sale is consistent, to the maximum extent practicable, with the terms of the California Coastal Management Program.¹

In order to appreciate the significance of this issue, it is important to understand the genesis of that management program. Under the provisions of § 306 of the CZMA, 16 U.S.C. § 1455, states are encouraged to prepare coastal management programs and submit such programs to the Secretary of Commerce for federal approval.² Through these programs, coastal states are to provide for comprehensive management of their coastal zones, making provision for protection of important resources and for sound and orderly development along their coasts. Congress' aim in enacting

¹ Respondents file this single brief in opposition to the petitions in both Nos. 82-1326 and 82-1327. The respondents on whose behalf this brief is filed include all of the parties plaintiff identified in DOI Pet. at (I), with the exception of the City and County of San Francisco and the Counties of Santa Clara and San Diego. For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Petition for a Writ of Certiorari of the Secretary of the Interior, *et al.*, are cited as "DOI Pet. at ____." All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at ____a." References to the petition of the Western Oil and Gas Association, *et al.*, are cited as "WOGA Pet. at ____." Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, e.g., "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23."

² Section 306 provides for federal funding to assist states in developing and administering coastal programs and sets forth a number of requirements and findings necessary for their approval by the Secretary of Commerce. Other than this federal funding, the provision of consistency review is the only incentive for a state to develop a coastal management program.

the CZMA was to protect the "national interest in the effective management, beneficial use, protection, and development of the coastal zone." 16 U.S.C. § 1451(a). Congress found that development of the nation's coastal zone, including "extraction of . . . fossil fuels," was causing the loss of biological resources, open space, and the fragile shoreline itself. 16 U.S.C. § 1451(c), (d), (e).

Congress thus perceived a need to resolve the serious conflicts among important, competing uses of coastal resources and chose comprehensive state coastal management programs as the proper vehicle to resolve these conflicts:

The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone. . . .

16 U.S.C. § 1451(i). To promote the creation of state programs and to ensure the comprehensive coastal management authority of the participant states, Congress provided that, once a state management program is approved by the Secretary of Commerce, all federal agencies must conduct their activities "directly affecting" the state's coastal zone in a manner that is, to the maximum extent practicable, consistent with the state's approved program. CZMA § 307(c)(1), 16 U.S.C. § 1456(c)(1).

In November 1977, the Secretary of Commerce approved the California Coastal Management Program (CCMP).³ In

³In April 1977, the Secretary issued a revised draft environmental impact statement and announced his intention to approve the California program. See *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 895 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Voluminous comments were received from a variety of sources, a substantial portion of which addressed the effects the proposed program would have on OCS oil leasing.

Interior's claims that, before approval of the CCMP, it did not anticipate application of the consistency requirements to the leasing stage and, therefore, would be unjustly surprised by such application now, DOI Pet. at 12-13, are belied by its comments on the proposed program. In its comments, the Department of the Interior, while conceding that California's program was exemplary, refused to accept the position that OCS leasing was subject to consistency review. CCMP, C.R. 3, Cal. Exh. L-18, Attachment J. at 20. Both WOGA and the American Petroleum Institute, as well as Exxon Corporation, also commented on the OCS implications of the CCMP. See, e.g., *id.* at 29, 33, 34, 37, 40.

so doing, he found that "the views of Federal agencies principally affected" by the program had been adequately considered.⁴ Approval of the California Coastal Management Program at 26 (Nov. 7, 1977) (citing 16 U.S.C. § 1456(b)). He further found that:

The management program provides for "adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature."

Id. at 18 (quoting 16 U.S.C. § 1455(c)(8)).

The American Petroleum Institute and the Western Oil and Gas Association (WOGA) sued to block approval of the CCMP. *American Petroleum Institute v. Knecht*, 456 F.Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). These oil industry groups brought their challenge out of a purported concern that California would use its consistency powers under the CCMP to preclude oil and gas activities along the coast. 456 F.Supp. at 922. They attacked the CCMP for the alleged failure to consider adequately the views of affected federal agencies and the national interest involved in planning for and siting energy facilities. 456 F.Supp. at 920-922. However, the district court and the Ninth Circuit both rejected these claims, as well as others that the plaintiffs advanced, finding that the Program did provide for adequate consideration of the national interest and of affected federal agencies' views. 456 F.Supp. at 889, 922-927; 609 F.2d at 1306, 1313-1315.

Since the approval of the CCMP, California has maintained that the Department of the Interior's adjacent OCS lease sales are federal activities directly affecting the state's coastal zone for which consistency determinations must be

⁴Interior's comments and Commerce's responses thereto are summarized in the CCMP, C.R. 3, Cal. Exh. L-18, Attachment J at 19-22.

performed.⁵ The lease sale is the stage of the OCS oil and gas extraction process at which Interior identifies specific areas of OCS lands to be offered for lease by competitive bidding and formulates lease stipulations to ensure the human and environmental safety of future operations on the lease sites. *See* DOI Pet. at 45a.

Several years of preparation and study by Interior precede each lease sale. As a part of these presale preparations, Interior and the oil industry expend considerable effort to determine the size and location of potential oil reserves. *See, e.g.*, Final Environmental Impact Statement on OCS Sale No. 53, C.R. 3, Cal. Exh. L-2 at 1-9 - 1-13. As the District Court held, the activities that occur during this period, including the call for nominations of tracts, the preparation and circulation of an environmental impact statement, and the publication of a final notice of sale, "define and establish the basic parameters for subsequent development and production." DOI Pet. at 45a. The tract selection at the lease stage determines "where the lessee can explore and produce oil and gas" and which areas will thus be exposed to the risk of oil spills. *Id.* The lease stipulations accompanying each lease sale are intended to insure protection for the coastal environment, as they influence the placement of drilling platforms and determine the standards for equipment and the training required of personnel. *Id.* at 45a-46a. The District Court concluded that "[L]easing sets in motion the entire chain of events which culminates in oil and gas development." DOI Pet. at 46a.

⁵The National Oceanic and Atmospheric Administration (NOAA), the Department of Commerce agency charged with administration of the CZMA, has promulgated regulations to ensure that the consistency requirements of § 307(c)(1) are carried out. 15 C.F.R. §§ 930.30-930.44. The mechanism through which a federal agency must attest that its proposed activity will be consistent to the maximum extent practicable with the state's management program is termed a consistency determination. 15 C.F.R. §§ 930.34, 930.37, 930.39.

While federal approval is required of individual lessees' plans prior to their undertaking exploratory and developmental drilling on any tracts they acquire, proposed plans for these activities on the various individual leases sold in a lease sale are not required to be submitted simultaneously, or in any particular geographic pattern. *See* 43 U.S.C. §§ 1340, 1351. In Lease Sale 53, there were 111 tracts, but the lessee's exploration and development plans are only required to focus on the activities that will occur on an individual tract. 30 C.F.R. §§ 250.34-1(a)(1), 250.34-2(a)(1). Even more importantly, the issues examined at the exploration and development stages are far narrower than those at the lease sale stage. The question at these stages is less whether drilling will proceed on the site than where and how it will proceed.⁶ In addition, at this later stage of the OCS process, it is the lessee — not Interior — who must certify consistency. 16 U.S.C. § 1456(c)(3). Thus, consistency certification of OCS activities at the post-lease sale stages as required by § 307(c)(3) must necessarily be of a more piecemeal, localized nature than review at the lease sale stage, when the geographical scope of the sale and the generic lease stipulations are entirely within Interior's control.

Prior to the decisions of the courts below, NOAA, the General Counsel of the Department of Commerce, and the Department of Justice had all taken the position that lease

⁶As the District Court recognized, the Secretary's authority to cancel leases once awarded is "limited," and "the cancellation procedure clearly is cumbersome and time consuming." Preliminary Injunction Opinion, Reporter's Transcript of Proceedings (May 27, 1981) at 100.

sales were subject to consistency review under § 307(c)(1).⁷ Nonetheless, when Lease Sale 53, off the central California coast, was in the final stages of preparation for leasing, Interior issued a negative determination, stating that none of its pre-lease activities directly affected the coastal zone. Letter from Secretary Andrus to Michael Fischer, Executive Director, California Coastal Commission (October 22, 1980), C.R. 3, Cal. Exh. L-12 at 1. This refusal to conduct a consistency determination set the stage for the instant lawsuit, because California objected to the leasing of certain tracts on the basis of Interior's failure to comply with the CZMA's consistency requirements.

Thus, on April 29, 1981, California filed a complaint in the District Court for the Central District of California, seeking to enjoin the leasing of 29 of the 111 tracts proposed

⁷Because of a disagreement over the applicability of § 307(c)(1) to the leasing stage of OCS development, in 1979 the Departments of the Interior and Commerce sought the opinion of the Department of Justice. The Department of Justice rejected Interior's position that its pre-lease sale activities were generically exempt from § 307(c)(1). Without deciding whether any particular lease sale directly affected a state's coastal zone, it agreed with the Commerce Department that these activities were subject to the consistency provisions of § 307(c)(1). Department of Justice Opinion, C.R. 3, Cal. Exh. L-15 at 13.

The opinions of the Departments of Justice and Commerce notwithstanding, Interior refused to conduct a consistency determination for the final notice of sale for Lease Sale 48 off southern California. 44 Fed. Reg. 44590 (July 30, 1979). California requested mediation by the Secretary of Commerce, as provided for in the CZMA, in order to resolve for future lease sales — particularly Sale 53 — the question of the applicability of § 307(c)(1) at the leasing stage. See 16 U.S.C. § 1456(h); 15 C.F.R. subpart 930(G). While the mediation was unsuccessful in producing any compromise, the mediator — the General Counsel of the Department of Commerce — concurred in California's view, calling the determination of the specific location in which to offer leases "the key activity that creates a right to develop those leases," and noting that consistency review at the exploration and development stages "will address specific and individual exploration and development plans and will provide only a piecemeal review of the leasing activities." Mediator's Memorandum for Secretary of Commerce (July 25, 1980), C.R. 3, Cal. Exh. L-7 at 2-3. He concluded that pre-lease activities are subject to the consistency provisions of § 307(c)(1). *Id.* at 4.

For NOAA's interpretation of § 307(c)(1), see 20. *infra*.

for leasing.⁸ Several environmental organizations simultaneously filed a similar complaint. A number of California city and county governments intervened on the side of the state.

The plaintiffs sought to enjoin preliminarily the leasing of the disputed tracts on the basis of Interior's refusal to conduct a consistency determination.⁹ The District Court found that California had demonstrated a probability of success on the merits of this claim and preliminarily enjoined the challenged portion of the lease sale.¹⁰ On cross-motions for summary judgment, the District Court held that Lease Sale 53 directly affected the coastal zone and must be the subject of a consistency determination, and made permanent its injunction against the leasing of the disputed tracts.

⁸These tracts contained only about 8% of the oil reserves projected for the sale area according to Interior's subagency, the United States Geological Survey. Letter from Secretary Watt to Governor Brown (May 1, 1981), C.R. 38, Fed. Exh. L-P.

⁹Plaintiffs did not seek a premature determination of inconsistency from the District Court but simply sought an order directing Interior to perform its consistency duties.

Plaintiffs also sought to enjoin leasing of the disputed tracts (plus three additional tracts) because of the Secretary of the Interior's rejection of the California governor's recommendations, under § 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1345, that these tracts be deleted from the sale. The courts below ruled against respondents on this claim.

Despite the attempts of Interior and WOGA to portray the protection of the sea otter as California's sole concern with the disputed tracts, DOI. Pet. at 5-6, WOGA Pet. at 4, the State's concerns included the negative effects of oil drilling on those tracts on many valuable biological resources, commercial and sports fisheries, ocean vessel traffic, port access, and coastal tourism and recreation. See Governor's Recommendation on Lease Sale 53, Comments of State Agencies on Lease Sale 53 and Comments of Local Governments on Lease Sale 53 (April 7, 1981), C.R. 3, Cal. Exh. L-1, Appendices at 20-21.

¹⁰Pursuant to the request of Interior and WOGA, the District Court allowed bids on the disputed tracts to be received and opened but prohibited the award of leases. Interior was to hold the money submitted with the bids pending resolution of the case. Approximately \$220,000,000 was bid, and Interior is currently holding \$44,000,000, which represents the 20% of the amount bid that Interior's regulations require to be submitted with the bids.

On appeal, the Ninth Circuit affirmed the District Court's ruling on § 307(c)(1). The Court of Appeals followed much the same course of reasoning as the District Court, analyzing the purpose of the CZMA, its legislative history, and NOAA's longstanding position on the meaning of "directly affecting." It concluded that the lease sale was a federal activity directly affecting the coastal zone because "decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production." DOI Pet. at 13a.

The petitions for writ of certiorari followed the entry of the judgment of the Ninth Circuit.¹¹

¹¹ Respondents have filed concurrently with this opposition a cross-petition for a writ of certiorari, seeking review of Part IV.E. of the Ninth Circuit's opinion, which discusses the meaning of the phrase "to the maximum extent practicable" as used in § 307(c)(1). Respondents believe that the issue petitioners present is not worthy of review by this Court and that Interior's and WOGA's petitions should be denied. If, however, this Court decides to grant their petitions, respondents wish to preserve their ability to present arguments challenging Part IV.E. The cross-petition has been filed out of an abundance of caution to insure their ability to raise those arguments.

REASONS FOR DENYING THE WRIT.

I.

THE LOWER COURTS' INTERPRETATION OF "DIRECTLY AFFECTING" AND THEIR AFFIRMATION OF CONSISTENCY REVIEW AT THE LEASING STAGE DO NOT WARRANT REVIEW BY THIS COURT.

Petitioners seek to invoke this Court's plenary review authority solely for the purpose of obtaining a narrow interpretation of a single phrase in § 307(c)(1) — "directly affecting." However, the lower courts' construction of this broad phrase does not depart from any "plain meaning" it has. That construction is supported by the purpose and legislative history of the CZMA; it was previously adopted by NOAA, the agency charged with administering the CZMA; it is in accord with the prior opinion of the Department of Justice; and it was recently reaffirmed by Congressional statements on the subject. Every court which has construed this language so far has reached the same conclusion as the courts below. Accordingly, the phrase "directly affecting" does not merit further review by this Court.

A. The Lower Courts Properly Construed "Directly Affecting."

At the outset, it is important to recognize that petitioners can claim no generic exemption from consistency review for OCS lease sales, either in the statutory language of § 307(c) or in its legislative history. Thus, petitioners "conceded on appeal that this section does apply at the lease sale stage." DOI Pet. at 12a.¹² Petitioners also do not dispute that oil and gas development pursuant to an OCS lease may "directly affect" the coastal zone of a state. At bottom,

¹²In the argument before the Ninth Circuit, the attorney for the federal petitioners made clear this concession: "First of all we are accused of saying this provision, (c)(1), is inapplicable to leasing. We do not take that position, (c)(1) is applicable, and in this case, the Secretary did apply it." Transcript of Oral Argument (January 15, 1982) at 10.

petitioners argue that an OCS lease does not in itself “directly affect” a state’s coastal zone because exploration and development are dependent upon intermediate federal approvals.¹³

It is surely no departure from any “plain meaning” of § 307(c)(1) to say that the “direct effects” of a lease are the intended uses of the property leased — in this case oil and gas development on the Outer Continental Shelf. The Ninth Circuit thus correctly viewed Lease Sale 53 as “the first link in a chain of events” which thereafter includes the approval of exploration and development plans, the oil and gas development and the consequent impacts upon a state’s coastal zone. DOI Pet. at 13a. The fact that intermediate approvals are required for the subsequent *private development* does not make the effects of the *federal activity*, the lease, any less “direct.”

This straightforward application of § 307(c)(1) to an OCS lease sale does not threaten to subject every other “federal activity” — however “indirect” — to consistency review, as petitioners imply. *See, e.g.*, DOI Pet. at 20-22. Thus, for example, if a federal agency were to impose a restriction on foreign oil imports, one might well hypothesize “effects” on a state’s coastal zone from the resulting inducement for additional domestic OCS oil and gas production. However, that kind of effect is one which clearly operates “indirectly,” or, to use petitioners’ terms, “mediately, remotely or collaterally.” *Id.* at 10.

¹³Throughout this litigation, petitioners have adopted inconsistent positions on these questions. For example, before this Court, they argue that § 307(c)(1) does *not* apply to an OCS lease sale. *See, e.g.*, DOI Pet. at 8, 10, 11, 19. They also suggest that application of consistency to lease sales should not be done on a case-by-case basis, but imply that they are generically exempt. *Id.* at 19-20. Their argument in the Ninth Circuit was just the contrary. *See* note 12, *supra*. In the trial court, they asserted that the determination of whether a lease sale “directly affects” a state’s coastal zone has to be made on a case-by-case basis. Reporter’s Transcript of Proceedings (July 17, 1981) at 186.

In place of this common sense view, petitioners have relied principally on semantic gamesmanship. In the District Court, they offered a variety of definitions of the word "direct" from a dictionary, but ultimately the "plain meaning" they assigned the term was a definition of their own making. *Id.* at 58a-59a. In particular, they asked the District Court to incorporate into § 307(c)(1) the tort concepts of "proximate" and "intervening cause" to determine when federal activities are subject to consistency review. DOI Pet. at 59a. Similarly, in this Court, they assert that "direct effects" are those which occur "proximately" or "without any intervening agency or instrumentality of a determining influence." *Id.* at 10.

More than enough judicial attention has already been devoted to these arguments. As the District Court observed, the tort concepts of "proximate" and "intervening cause" were created by the courts to *limit* tort liability and have no relevance to a statute designed to *foster* intergovernmental coordination in the management of coastal resources. *Id.* at 59a. Moreover, even assuming these tort concepts had been incorporated into the statute by Congress, the District Court properly concluded that their literal application would not alter its decision. *Id.* at 60a-61a.¹⁴

As applied to OCS leasing in practice, petitioners' definitions of "directly affecting" are highly artificial and

¹⁴For example, the District Court noted that *Black's Law Dictionary* (5th Ed. 1979) defines an "intervening cause" as one which "turns aside the natural sequence of events, . . . produces a result which would not otherwise have followed and which could not have been reasonably anticipated . . . and destroys the causal connection" between the act and the effect. DOI Pet. at 60a n.16. Clearly, the intermediate federal approval required for exploration or development under an OCS lease cannot be considered an "intervening cause" in any of these respects.

Petitioners also cite the definitions of "direct" and "indirect" effects in the Council on Environmental Quality's regulations implementing the National Environmental Policy Act. *Id.* at 10 n.11. However, it is ironic that petitioners rely upon a definition adopted by an agency without any responsibility for interpreting the CZMA, and at the same time ignore the definition adopted by NOAA, the one agency designated by Congress with that responsibility. See discussion *infra* at 20.

grossly distort the actual leasing process. For example, by virtue of the intermediate approvals for exploration and development required by Congress in the OCSLA, 43 U.S.C. §§ 1331 *et seq.*, the Department of Interior asserts that "a lease does not authorize the lessee to explore, develop or produce oil or gas." DOI Pet. at 15. However, Congress itself understood the practical significance of such a lease to be just the opposite. In OCSLA, it defined a "lease" as "any form of authorization which . . . authorizes exploration for, and development and production of, minerals." 43 U.S.C. § 1331(c) (emphasis added).

As the Ninth Circuit observed, "decisions made at the lease sale stage in this case established the basic scope and charter for subsequent development and production." DOI Pet. at 13a.¹⁵ If, as petitioners assert, *id.* at 21 n.21, there were so little "identifiable" or "clear relationship" between an OCS lease and actual oil and gas development, one would wonder why the members of petitioner WOGA are willing to post huge sums of money in order to secure these leases.¹⁶

There is nothing at all remarkable in the lower courts' rejection of petitioners' "narrow definition of 'directly affecting.'" *Id.* at 13a. The lower courts did not renounce the plain meaning doctrine as a "subterfuge," *id.* at 10, but rather rejected petitioners' misuse of that doctrine. *See, e.g.*, DOI Pet. at 58a-61a. Nor can petitioners seriously maintain that the lower courts stepped beyond the proper boundaries

¹⁵As discussed *supra* at 5-6, the selection or deletion of tracts and the adoption of lease stipulations profoundly affect, *inter alia*, "whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic and the siting of on-shore construction." DOI Pet. at 13a. Moreover, the lease sale stage is the only meaningful opportunity for analysis of the cumulative effects of development on the tracts leased, as discussed *infra* at 17-18.

¹⁶In fact, on a single tract in Lease Sale 53, not disputed in this litigation, Chevron Oil Company U.S.A., Inc., and Phillips Petroleum Corporation bid \$333,600,000. *Los Angeles Times*, April 29, 1981, Part I at 1.

of statutory construction in this case by extensively reviewing the legislative history and purpose of the provision in question, *see, e.g.*, WOGA Pet. at 10-11 — particularly since the statutory term “directly affecting” is not itself defined in the Act.¹⁷ In sum, the lower courts’ interpretation of the statutory language raises no novel issues warranting this Court’s review.

B. There Is Nothing Unusual in Requiring an Environmental Review Under the Consistency Provision at This Important Stage of the OCS Decisionmaking Process.

Petitioners also assert that the lower courts failed to take account of what they characterize as a “unique” federal regime of “phased decisionmaking” in which “the initial determination to authorize oil and gas activity on a tract in the OCS, by offering it at a lease sale, can be modified or reversed” at later stages. DOI Pet. at 14. However, this type of “phased decisionmaking” is scarcely “unique” in federal statutory regimes.¹⁸ The courts have typically rejected agency arguments of the kind petitioners make here that the environmental effects of such “initial determinations” need not be assessed because they are too “speculative, remote and subject to further . . . review” at later stages. *Id.* at 9.¹⁹ Rather, such assessments are required to

¹⁷The policy considerations behind the statute, the purpose it was intended to achieve and the legislative history are obviously important resources in determining legislative intent. *Blue Chip Stamp v. Manner Drugs*, 421 U.S. 723, 737 (1973).

¹⁸For example, the Mineral Lands Leasing Act, 30 U.S.C. §§ 181 *et seq.*, requires Interior to consider the environmental effects of issuance of a coal lease, 30 U.S.C. § 201(c)(3)(C), despite the fact that mining is dependent on Interior’s later environmental review and approval of an “operation and reclamation plan” submitted by the lessee. 30 U.S.C. § 207.

¹⁹*See, e.g., Scientists Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1086 (D.C. Cir. 1973) (holding that the policy favoring early environmental review in NEPA outweighed the AEC’s arguments that the project was of a “remote and speculative nature” and “remains uncrystallized in form and undetermined in application.”)

be conducted at "the earliest possible time."²⁰ In holding that Interior's "initial determination to authorize oil and gas activity" required a consistency determination, the decisions of the lower courts follow these fundamental principles.²¹ In this respect, there is nothing unusual about the decisions below which would warrant this Court's plenary review.

Indeed, these same principles have previously been held applicable to the phased decisionmaking procedures established for OCS development. The Court of Appeals for the District of Columbia Circuit described these procedures as "pyramidal in structure, proceeding from broad-based planning to increasingly narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981). In that case, the court specifically rejected the same arguments as are advanced by petitioners here — that they could defer review of "highly variable or speculative matters which are best addressed at a specific future time." 668 F.2d at 1305. The court held that decisions in connection with the Interior's preparation of a five-year leasing plan must be made on the basis of the information available at the initial stages of the process, rather than being deferred to later stages:

²⁰ *Andrus v. Sierra Club*, 442 U.S. 347, 351 (1979) (quoting CEQ regulations with approval).

²¹ Petitioners purport to rely on cases decided under NEPA to excuse their failure in Lease Sale 53 to make a consistency determination under the CZMA. DOI Pet. at 15 n.16. However, NEPA is a completely distinct statute which does not alter consistency obligations under the CZMA. Petitioners concede as much when they recognize that NEPA imposes only "procedural" requirements and "does not prescribe the substantive content of federal decisions" as the CZMA does. *Id.* at 21-22. Thus, as discussed *infra* at 18-19, it is all the more important that the *federal decisions* at the lease sale stage be subjected to consistency review. Moreover, the sole issue that petitioners seek to place before this Court is whether the threshold requirement for a consistency determination is met at the lease sale stage. While the NEPA cases cited by petitioners established certain parameters for Interior's environmental review of an OCS lease, they also confirmed the threshold requirement that such a review be conducted at the leasing stage. *See also*, cases cited in notes 19, 20, *supra*, and notes 24, 25, *infra*.

Although the continual collection and assimilation of pertinent information must of course continue throughout the OCS process, and although the speculative nature of any information may well affect the weight the Secretary attaches thereto in drawing up the leasing program, § 18(a)(2) [of OCSLA] nonetheless requires the Secretary at the program stage to consider each factor listed therein on the basis of the best information available, and to base the leasing information upon the information thereby obtained." *Id.* at 1307.²²

The lower courts in the instant case thus applied principles that have been uniformly upheld in construing other environmental review statutes, as well as the OCS leasing process itself. The opinions below carefully analyzed the "pyramidal" structure of the OCS process and concluded that Congress' purpose in requiring consistency review of federal activities in § 307(c)(1) of the CZMA could be fulfilled only if consistency is determined at the lease sale stage.

The lease sale is the only stage in the OCS process at which *federal activities* are involved within the meaning of § 307(c)(1). The lease sale is the federally-initiated action which "establish[es] the basic scope and charter" for all subsequent exploration and development of the area. DOI Pet. at 13a.²³ Once the lease sale occurs, the initiative passes

²²Petitioner WOGA implies that the District of Columbia Circuit held in that case that consistency review was not required with respect to Lease Sale 53 but could be deferred to later stages. WOGA Pet. at 15 n.16. However, the issue of consistency review at the lease sale stage was not before the District of Columbia Circuit, and it did not so hold.

²³Interior's decision to offer specific tracts (and not others) for leasing sets the basic parameters for the location of oil production and transportation on the OCS. For this reason, tract selection also determines broadly which coastal areas may be needed for petroleum processing and transportation; whether the mode of transportation will be pipelines or tankers (with their differing risks and impacts); where the risks of vessel collisions, well blowouts and other accidents will be increased; where OCS structures such as platforms may be built; and where other heavy industrial activities associated with OCS development are likely to occur. See generally DOI Pet. at 45a-46a.

to industry. The later review is confined to plans for specific tracts submitted by each lessee, in the order and time of its own choosing, and it is the applicant — not the Secretary — who must certify consistency at that stage.

From a practical standpoint, the lease sale is thus the only stage at which certain matters can be decided effectively by the federal government. For example, it is only at that stage that the cumulative impacts of the oil and gas development which may occur under the leasing can be properly evaluated.²⁴ Otherwise, review is limited to specific exploration and production plans which may be submitted at different times for different tracts. As the District of Columbia Circuit observed in *California v. Watt, supra*, the Secretary has never explained how the larger decisions can be made “in the context of a decision on the placement of a particular exploratory well.” 668 F.2d at 1306.²⁵

The lease sale is fundamentally a “subdivision” of the OCS into tracts. Thus, the Ninth Circuit correctly discerned that “critical decisions” are made at that stage:

Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed

²⁴See *Kleppe v. Sierra Club*, 427 U.S. 390, 409-10 (1976) (“... when several proposals for coal-related actions that will have a cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together.”)

²⁵See also *Cady v. Morton*, 527 F.2d 786 (9th Cir. 1975) (holding that an EIS on a mining plan for 770 acres did not satisfy DOI’s obligation to prepare a comprehensive EIS on the impact of the precedent leases of 30,000 acres of land).

to danger, the flow of vessel traffic and the siting of on-shore construction. DOI Pet. at 13a.²⁶

The "direct effects" upon a state's coastal zone from these federal decisions are obviously matters of concern to the state. The Ninth Circuit determined that the intergovernmental coordination encouraged by the CZMA would be severely hampered unless the state is "permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone." *Id.* at 14a.²⁷

If petitioners' view were adopted, the "federal activity" in the OCS process would never be subjected to a review for consistency. Petitioners' argument fails to recognize the important decisions made at the lease sale stage and runs counter to the case law requiring environmental review at the earliest stages of such a phased decisionmaking process.

²⁶Petitioners assert that there is insufficient information at the lease sale stage to address the sort of concerns which the state has raised regarding Lease Sale 53. DOI Pet. at 19. Nevertheless, in Lease Sale 48, which preceded Lease Sale 53. Interior deleted 24 tracts in the Santa Barbara Channel *at the lease sale stage* expressly for a purpose similar to one of the state's concerns in Lease Sale 53 — "[t]he objective of protecting the valuable seabird and marine mammal rookeries" in that part of the sale area. Letter from Secretary Andrus to Governor Brown (June 29, 1979). In addition, Interior has previously conceded that the imposition of lease stipulations can substantially reduce adverse coastal impacts which would otherwise occur. Solicitor's Opinion (October 1979), C.R. 3, Cal. Exh. L-11, at 8; *Alaska v. Andrus*, 580 F.2d 465, 471, 478 (D.C. Cir. 1978).

²⁷If consistency review were deferred, as petitioners urge, until the oil industry's submission of exploration and development plans on specific tracts leased, then the affected state and local governments would be limited to reviewing such plans under CZMA § 307(c)(3) on a tract-by-tract basis and would necessarily be deprived of the opportunity to have the provisions of the management program applied to the entire sale. Evidence presented by respondents in the District Court, for example, showed that the exploration and development plans in the Santa Barbara Channel were submitted for the state's consistency review for random geographic areas over a 2½ year period. Affidavit of Mari Gottdiener, C.R. 86 at 63. The broader concerns of the state — determination of which areas should be protected from the risk of oil spills, which modes of oil transportation should be employed and where on-shore construction should sensibly be located — are impossible to address on this piecemeal basis.

Thus, the lower courts properly concluded that the lease sale stage presented the only occasion for the important comprehensive review of the "federal activity" and properly rejected petitioners' notion that consistency review must be deferred until more information is available at later stages of the OCS process.

C. The Ninth Circuit's Decision Is in Accord with the Decisions of Other Courts on This Question, the Prior Interpretations of NOAA and the Department of Justice and the Express Intent of Congress.

The instant petitions present no occasion for this Court to resolve any conflict in decisions of the Courts of Appeals, because there is no such conflict. Every judge who has examined this issue so far has reached the same result.²⁸ Not surprisingly, in the wake of these decisions the Department of the Interior has itself determined to prepare consistency determinations nationwide upon all subsequent lease sales and has in some instances already prepared such determinations. DOI Pet. at 19 n.18.

Moreover, the decisions for which review is sought in this Court follow the past interpretations of the single agency charged by Congress with authority to construe the terms of the Coastal Zone Management Act, the National Oceanic and Atmospheric Administration. Thus, in its final 1979 regulations, NOAA expressly stated that "Section 307(c)(1) of the CZMA applies to Interior's OCS pre-lease sale activities directly affecting the coastal zone." 44 Fed. Reg. 37142.²⁹

²⁸See *Kean v. Watt*, No. 82-2420 (D.N.J., Oct. 8, 1982) (Reoffering Sale 2); *California v. Watt*, 17 ERC 1711 (C.D. Cal. June 9, 1982) (Lease Sale 68).

²⁹That position was restated by NOAA on subsequent occasions, until after the instant suit was filed. At that time, NOAA proposed to revise its regulations to adopt the view previously espoused by Interior that the provision did not apply to lease sale activities. As discussed *infra* at 25, after Congressional resolutions objecting to the proposed revision were introduced, NOAA withdrew it.

The Department of Justice itself rendered essentially the same opinion at an earlier stage. That 1979 opinion rejected the contentions of Interior that in 1976 Congress expressed its intent to exempt leases from § 307(c)(1), as well as Interior's argument that application of consistency to lease sales is incompatible with § 19 of OCSLA. *See* Department of Justice Opinion, C.R. 3, Cal. Exh. L-15. The opinion expressly concludes that the "pre-leasing activities of the Secretary of Interior are subject to the conformity requirements of Section 307(c)(1)." *Id.* at 13.

Most importantly, the interpretation of "directly affecting" by the lower courts is supported by the legislative history of the CZMA and of the OCSLA, as well as express recent pronouncements by Congress, as discussed in the next section. Thus, the question which petitioners seek to place before this Court has already been answered in the same way not only by every court which has so far considered the question but also by the agency charged with construing the statute, by the Department of Justice in prior opinions and by Congress. This case accordingly presents no occasion worthy of this Court's grant of plenary review.

II.

CONGRESS HAS DETERMINED THAT OCS LEASE SALES MUST BE CONSISTENT WITH APPROVED COASTAL ZONE MANAGEMENT PROGRAMS PURSUANT TO § 307(c)(1).

Petitioners argue that the decisions of the lower courts will disrupt a carefully ordered Congressional scheme for expedited OCS development and will imperil efforts to resolve the country's energy problems. DOI Pet. at 18-21; WOGA Pet. at 15-18. However, Congress has recognized the conflicting interests in the coastal zone and has recently reaffirmed its desire that those conflicts be resolved in precisely the manner upheld by the lower courts. If petitioners believe that the application of consistency review to OCS lease sales strikes an improper balance between state and

federal interests in the coastal zone and development in adjoining OCS areas, their remedy lies in seeking an alteration of Congressional policy and not in further review of this matter by this Court.

Petitioners would have this Court believe that Congress has determined that the "national interest" is best served solely by expediting OCS development — regardless of its impact on proper management of the coastal zone. However, the first premise of the CZMA is the Congressional finding that "[t]here is a national interest in the effective management, beneficial use, protection and development of the coastal zone." 16 U.S.C. § 1451(a). Congress recognized that energy demands on the OCS "are placing stress on these areas and creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters." 16 U.S.C. § 1452(f). Congress also recognized that conflicts between federal agencies and states would arise.

Congress resolved these conflicts in two fashions. First, it required that states seeking federal approval of coastal management programs provide in the program for adequate consideration of the "national interest" in both the protection of the coastal environment and the siting of energy facilities. *See, e.g.*, 16 U.S.C. §§ 1452(2)(B), (C); 1453(6); 1454(b)(8); 1455(c)(8). Moreover, Congress required that state coastal programs not be approved until the views of all affected federal agencies, including Interior, have been considered.

Second, Congress established a mechanism for resolving conflicts between federal agencies and states with approved coastal programs by directing that the activities of those agencies be consistent to the maximum extent practicable with the approved programs. 16 U.S.C. § 1456(c)(1). Congress thus made clear that states with approved programs — *i.e.*, programs which adequately consider the national interest as well as the views of federal agencies — would

have, through the consistency mechanism, an important voice in federal activities affecting the coastal zone. Moreover, in the OCSLA, Congress provided that the coastal states would be given a greater role in the OCS decision-making process, without limiting any of the prerogatives granted those states in the CZMA. Thus, it is Congress that has established the relative roles of the states and Interior, and the lower courts have done no more than recognize the balance established by Congress.

Petitioners, however, are asking this Court to set a different balance than that established by Congress, despite the fact that the most recent pronouncements of Congress on § 307(c)(1) are completely contrary to their position. In effect, petitioners seek to have this Court judicially amend § 307(c)(1).

A. Congress Has Directed That a Consistency Determination Be Prepared at the Lease Sale Stage.

Petitioners rely upon selected excerpts of the legislative history of the OCSLA and the CZMA to argue that Congress did not intend OCS lease sales to be subject to consistency review. DOI Pet. at 14-18; WOGA Pet. at 15-18. However, this argument is flatly contradicted by the legislative history of both statutes.

In the legislative history to § 19 of OCSLA, 43 U.S.C. §1345, the section upon which petitioners rely, the House Report attempted to clarify the roles of Interior and the states in light of the consistency requirements of the CZMA. The House Report states as follows:

The committee is aware that under the Coastal Zone Management Act of 1972, as amended in 1976 (16 U.S.C. 1451 *et seq.*), certain OCS activities *including lease sales* and approval of development and production plans must comply with "consistency" requirements as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Title IV and V of the 1977 Amend-

ments, nothing in this act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency if a State has an approved Coastal Zone Management Plan.

H. Rep. No. 590, 95th Cong., 1st Sess. 153 n.52 (1977) (emphasis added). In fact, Congress formalized this intent in the savings clause of the OCSLA, 43 U.S.C. § 1866(a), which specifically provides that "nothing in that Act shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972. . . ."

In short, the OCSLA and its legislative history explicitly confirm that the consistency requirements of the CZMA apply to OCS lease sales and that the OCSLA was not intended to change that result. This is exactly the point recognized by the lower courts. DOI Pet. at 18a-19a, 51a-54a.³⁰

These statements of Congress regarding the OCSLA are in full accord with Congressional statements on the CZMA. Thus, the Senate Report regarding the 1980 amendments to the CZMA states:

The Department of Interior's activities which *preceded lease sales* were to remain subject to the requirements of section 307(c)(1). As a result, intergovernment coordination for purposes of OCS development commences at the *earliest practicable time* in the opinion of the Committee, as the Department of Interior sets in motion a series of events which has consequences in the coastal zone. Coordination must *continue* during the critical exploration, development and production stages.

³⁰The Department of Justice, in its 1979 opinion, expressly relied upon the savings clause and the legislative history of § 19 to reject Interior's position. See Department of Justice Opinion, C.R. 3, Cal. Exh. L-15 at 11-13.

S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) (emphasis added). The 1980 House Report also noted specifically the "Federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." H. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980).³¹

Given these clear statements from Congress, NOAA, the agency charged with administering the CZMA, historically took the position that federal OCS lease sale decisions required a consistency determination. It is extremely significant that when NOAA in 1981 suddenly sought to reverse this long-held position, and to exempt OCS lease sales from the requirements of § 307(c)(1), resolutions of disapproval were immediately introduced in both Houses of Congress. NOAA promptly withdrew its new regulation, citing the negative reaction from Congress as well as the coastal states. 46 Fed. Reg. 50976 (1981); *see also* DOI Pet. 17a-18a, 57a-58a. Petitioners, however, have ignored this most recent manifestation of Congressional intent as well as the relevant legislative history of the CZMA.³²

³¹These unequivocal statements from Congress in 1980 represent no departure from its earlier views. For example, the Senate Report accompanying the 1976 amendments to the CZMA noted that past difficulties arising from the lack of coordination between coastal states and federal agencies prior to OCS lease sale decisions could be resolved by "[f]ull implementation of the Coastal Zone Management Act of 1972. . . ." S. Rep. No. 277, 94th Cong., 2d Sess. 3 (1975). Moreover, the Senate Report again concluded, with specific reference to federal OCS activities, that ". . . under the act as it presently exists. . . if the activity may affect the State coastal zone and it has an approved management program, the consistency requirements do apply." *Id.* at 37.

³²Lacking any legislative history on § 307(c)(1) to support their position, petitioners rely on the legislative history of another section, § 307(c)(3). While § 307(c)(1) addresses federal agency activities which directly affect the coastal zone, § 307(c)(3) applies only to *applicants* for federal licenses or permits. 16 U.S.C. § 1456(c)(3). Petitioners suggest that since the word "lease" was not added to § 307(c)(3) in 1976, federal leasing activities are somehow excluded from consistency coverage under § 307(c)(1). DOI Pet. at 16-18; WOGA Pet. at 15-17. However, as discussed *supra* at notes 12, 13, this assertion completely contradicts petitioners' concession that § 307(c)(1) does apply to federal OCS lease sale decisions. Moreover, as the trial court found, this ar-

B. Pursuant to Congress' Intended Meaning of "Directly Affecting," Consistency Review Necessarily Applies at the Lease Sale Stage.

The meaning which Congress attached to the phrase "directly affecting" clearly requires that the consistency determination of § 307(c)(1) be conducted at the lease sale stage, and it is the Congressional understanding of this phrase that the lower courts applied to Lease Sale 53.

The 1971 Senate Report explained the intent of Congress concerning the federal activities which were to be subject to § 307(c)(1):

It is intended that any lands or waters under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering federal agency determines them to have a *functional interrelationship from an economic, social or geographic standpoint with land and waters within the coastal estuarine zone*, should be administered consistent with approved state management programs.

S. Rep. No. 526, 92nd Cong., 1st Sess. 30 (1971) (emphasis added).³³

gument must be rejected as an impermissible repeal by implication. DOI Pet. at 48a. The most that can be said of the history of § 307(c)(3) is that the *applicant* for a federal OCS lease does not have to engage in a consistency determination at the lease sale stage. Congress has specifically stated that the 1976 amendments to § 307(c)(3) "did not alter *federal agency* responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases." H. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980) (emphasis added); see also S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

³³Early versions of § 307(c)(1) applied only to federal activities "in" the coastal zone. In 1972, the Conference Committee broadened the phrase considerably by substituting the "directly affecting" language now found in the Act. Petitioners assert that Congress intended to retain the original limitation of § 307(c)(1) to federal activities "in" the coastal zone and substituted the phrase "directly affecting" to further limit the scope of § 307(c)(1). DOI Pet. at 11 n.13. However, the trial court correctly found that this change was intended to expand the scope of the provision. DOI Pet. at 46a. This conclusion is unavoidable since the language is clearly of broader import than the language originally proposed. Moreover, contrary to petitioners' assertion, the Senate Report specifically noted that the federal activities covered by § 307(c)(1) included "... activities *in or out of the coastal zone* which affect that area." S. Rep. No. 277, 94th Cong., 1st Sess. 36-37 (1975) (emphasis added).

In 1980, Congress reauthorized the CZMA. 94 Stat. 2060 (1980). Congress amended certain sections of the Act but did not alter any of the § 307 consistency provisions. However, at that time, Congress also recognized the uncertainty that had arisen concerning the interpretation of the threshold test of § 307(c)(1). H. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980). To resolve any uncertainty, the House Report restated that 1971 formulation of the "functional interrelationship" test, quoted above, and added this further clarification:

Thus, when a federal agency initiates a series of events of coastal management consequences, the intergovernment coordination provisions of the federal consistency requirements should apply.

Id. at 34. See also S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Congress has thus made its intention perfectly clear. The threshold test of § 307(c)(1), "directly affecting," is satisfied whenever a federal agency initiates a series of events of coastal management consequence. H. Rep. No. 1012, *supra*, at 34. As NOAA noted, this test is interchangeable with the "functional interrelationship" language which was derived from the 1971 Congressional deliberations. See 44 Fed. Reg. 37143 (1979).

The lower courts did no more than give effect to these Congressional tests.³⁴ As the Ninth Circuit stated, "Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and

³⁴Lacking support in the legislative history for their definition, petitioners are forced to argue that the 1980 legislative history is entitled to no weight. DOI Pet. at 12 n.14; WOGA Pet. at 18 - 19. Petitioners have ignored the fact that the "functional interrelationship" test is drawn from the 1971 legislative history. Moreover, the courts below properly concluded that the 1980 legislative history is entitled to substantial weight. DOI Pet. at 15a - 16a, 50a - 51a; see also *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667 n.8 (1980).

development of oil and gas on the individual tracts leased.” DOI Pet. at 13a. Similarly, the District Court held:

Only a definition which provides for the application of § 307(c)(1) at the decision-making stage of the leasing process will effectuate the congressional intent and give proper meaning and focus to the Act. Clearly, *the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone*. Any other interpretation would thwart the purpose of the Act.

Id. at 51a (emphasis added).

Thus, Congress has repeatedly addressed — in unequivocal terms — the very question which petitioners seek to place before this Court. The decisions of the lower courts merely follow the Congressional intent underlying § 307(c)(1). However much petitioners may believe that the national interest will be served by a reversal of these decisions, the appropriate forum for consideration of such a reversal is Congress, not this Court.

III.

THE DECISIONS BELOW WILL NOT DISRUPT OCS LEASING OR OTHER FEDERAL ACTIVITIES.

Petitioners argue that the decisions of the lower courts portend delay and litigation over future OCS lease sales, as well as disruption of other federal activities. DOI Pet. at 18-22. However, what petitioners ignore is that the lower courts have merely followed the will of Congress that the CZMA apply in this fashion to OCS activities.

Moreover, adherence to the decisions below has caused no disruption of OCS activities. Consistency determinations are now being prepared by Interior on all OCS lease sales without causing any apparent undue burdens. Indeed, the American Petroleum Institute has recently informed the Court of Appeals for the District of Columbia Circuit that

the Ninth Circuit's ruling has resulted in only "insignificant" revisions in the scheduling of several lease sales.³⁵

In fact it is certainly arguable that there will be *less* delay and disruption of OCS leasing if state management program are applied in § 307(c)(1) consistency review at the lease sale stage, under the decisions of the lower courts, than if the states are relegated to review of individual exploration and development plans under § 307(c)(3) at a later stage of the process. As the District Court found:

If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual leases as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decisionmaking envisioned by the draftsmen of the CZMA.

DOI Pet. at 46a.

NOAA has similarly observed that "implementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environment and socioeconomic impacts, *thereby reducing conflicts with affected states and avoiding delay in the exploitation of offshore energy resources.*" 44 Fed. Reg. 37142 (1979) (emphasis added). Thus, application of § 307(c)(1) at the lease sale stage may well lead to early resolution of problems rather than forcing resolution on a tract-by-tract basis under § 307(c)(3).³⁶

³⁵"Supplemental Memorandum of Intervenor in Response to Court Order dated January 28, 1983," filed February 7, 1983, in *State of California v. Watt*, D.C. Cir. No. 80-1894, *et al.*

³⁶Section 307(c)(3) provides that an applicant for a federal license or permit to conduct an activity affecting land or water uses in the coastal zone shall provide a certification that the proposed activity complies with the approved coastal program and will be conducted in a manner consistent with the program. The federal agency may not issue the permit or license until the state concurs in the consistency certification or unless the Secretary of Commerce finds the activity to be consistent with the state program or otherwise in the interest of national security. 16 U.S.C. § 1456(c)(3).

Similarly, the possibility of a state using § 307(c)(1) to veto OCS development is simply not supported. First, it is Interior and not the state that issues a determination of whether the lease sale can be conducted consistent with the state's coastal management program. 15 C.F.R. § 930.34. Second, consistency is required to be determined only for state programs approved by NOAA. Under the CZMA, NOAA cannot approve a state program unless the program gives adequate consideration to the national interest in both coastal protection and energy development and to "the views of federal agencies principally affected by such programs." 16 U.S.C. §§ 1452(2)(A), (B); 1455(c)(8), 1456(b). In fact, the California Coastal Management Program has been specifically held to satisfy those requirements. *American Petroleum Institute v. Knecht*, 609 F.2d 1036, 1315 (9th Cir. 1979).

Finally, petitioners allege that the lower courts' reading of "directly affecting" will disrupt a "wide range of federal activities." DOI Pet. at 20-21. Petitioners fail to note that the lower courts' decisions were consistent with NOAA's longstanding view that "directly affecting" must be liberally construed. Despite NOAA's interpretation, which has been relied upon by federal agencies and coastal states for a number of years, the federal government has not been thrown into chaos, contrary to petitioners' contentions.³⁷

³⁷In fact, petitioners can provide no example of such disruption except for a single hypothetical involving coal leasing in Wyoming. DOI Pet. at 20 n.21. However, there is nothing in the opinions below which supports the application of § 307(c)(1) to such a farfetched hypothetical. Nor do petitioners provide any evidence that any coastal state has ever asserted such a position. Other than this single example, petitioners never explain how federal activities will be thrown into "chaos." It is obvious that OCS leasing immediately adjacent to a state's coastal zone, with recognized impacts flowing from such leasing, has a "clear" and "identifiable" relationship to the coastal zone, in contrast to a coal lease in Wyoming where there exists merely "the possibility that a lessee might use a proposed pipeline to transport coal to a gulf coast port." DOI Pet. at 20 n.21 (emphasis added).

Conclusion.

The petitions for a writ of certiorari of the Department of Interior and the Western Oil and Gas Association should be denied.

Respectfully submitted,

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No. 82-1327

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

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Petitioners,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

In their zeal to defend the Ninth Circuit's construction of the term federal "activit[y] directly affecting the coastal zone," as used in Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1) (1976), respondents clearly reveal the significance of the issue presented by the petition in this case.

1. Respondents attempt to create the impression that the lower courts' interpretation of Section 307(c)(1) only imposes the requirement for "an environmental review" at the leasing stage of an OCS project, comparable to that required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1976). (Opp. 13-18). If this case involved no more than NEPA-type consideration of state CZMA programs, petitioners

would not be here. NEPA itself is broad enough to require consideration of such programs.¹

Respondents reveal the significance of the lower courts' construction of Section 307(c)(1) when they assert that a broad definition of "directly affecting" is necessary to allow States to exercise "comprehensive coastal management authority" under Section 307(c)(1). (Opp. 2; *see also id.* at 20-21). Indeed, respondents themselves describe NEPA as "a completely distinct statute which . . . imposes only 'procedural' requirements and 'does not prescribe the substantive content of federal decisions' as the CZMA does." (Opp. 14 n.21).

Respondents go even farther in the cross-petition which they have filed seeking review of the Ninth Circuit's interpretation of the phrase "maximum extent practicable." Recognizing that the lower court has diluted the authority which they seek under Section 307(c)(1), they argue that the matter was "Too Important" to be made in the context of this case (Cross-petition 6), because it detracts from the "comprehensive authority" which they assert Congress gave them under Section 307(c)(1) (*id.* at 6-7), and thus "would deprive coastal states of the strong management role Congress granted them in enacting the CZMA" (*id.* at 10).

Thus, we deal here with the State's assertion of substantive authority over the OCS. This is a matter which this Court has repeatedly addressed in a number of cases² and which it should address again here to resolve the ambiguities created by the Ninth Circuit's construction of the CZMA.

¹ *See Massachusetts v. Andrus*, 594 F.2d 872, 884-86 (1st Cir. 1979) (NEPA consideration of alternative management for the OCS under the Marine Sanctuaries Act, 16 U.S.C. § 1431); *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1376, 1379 (2d Cir. 1977) *cert. denied*, 434 U.S. 1064 (1978) (EIS considered state and local regulatory requirements concerning pipeline placement.)

² *See, e.g., United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950); *United States v. Maine*, 420 U.S. 515 (1975).

2. The Ninth Circuit clearly realized that its requirement of a consistency determination prior to OCS lease sales "unavoidably raises additional issues," and that "[f]oremost among these is whether consistency . . . means simply conformity to the program in the manner deemed appropriate by the state concerned." (WOGA petn. 21a). Thus, the court held that final authority to determine consistency "must reside in the Executive Branch of the federal government." However, the court acknowledged that it would be necessary in the future to proceed on a case-by-case basis to determine the required degree of consistency since "each situation" must be handled "with care and sensitivity to the concerns of the state and the nation." (*Id.* at 24a).

This Solomon-like judgment—broadly interpreting "directly affecting" to give States an opportunity in every case to probe a consistency determination, while leaving final decisional authority in the hands of the federal government—has already led to significant delay and disruption of the OCS program. Since the filing of our petition,¹ the United States District Court for the District of Massachusetts in *Conservation Law Foundation v. Watt*, No. 83-0506-MA, (unreported, March 28, 1983), *appeal pending*, No. 83-____ (1st Cir.), upheld the claims of a State and environmental groups that the consistency determination prepared for OCS Sale No. 52 (North Atlantic) did not prove consistency to the "maximum extent practicable" and thereby preliminarily enjoined that sale. Three days later, environmental plaintiffs, fishermen groups, and others filed suit making similar allegations in connection with OCS Sale No. 70 (St. George Basin). *Village of False Pass v. Watt*, No. A83-176 (D. Alaska).²

¹ WOGA's petition noted the existence of four Section 307(c)(1) cases which followed in the wake of the district court's decision in this case. (WOGA petn. 9 n.10).

² Respondents refer to a representation made by the American Petroleum Institute to the D.C. Circuit in connection with its current consideration of Secretary Watt's five-year OCS leasing program in

Absent the grant of certiorari in this case, there can be little doubt that such litigation will continue. As the federal petitioners have informed this Court, the Department of the Interior has felt obliged to prepare consistency determinations for all OCS lease sales, since the majority of the controversial ones lie offshore States that are included within the Ninth Circuit. Future litigation concerning Section 307(c)(1), therefore, will not raise the question whether a lease sale "directly affects" the coastal zone and thus requires the preparation of a consistency determination, but instead will present issues concerning the adequacy of a determination that has been made. WOGA believes that it has shown in its petition and is confident that it can show on the merits that the Ninth Circuit erred in its construction of "directly affecting." This case, in all probability, will be the last opportunity for the Court to correct that error and avoid unnecessary CZMA-based litigation concerning OCS leasing.¹

California v. Watt, No. 82-1822, *et al.*, that the Ninth Circuit's decision has resulted in only insignificant revisions in the scheduling of several lease sales. (Opp. 26-27). As respondents are fully aware, that representation had to do solely with the changes in the five-year leasing schedule associated with the preparation of consistency determinations. It was not a comment upon the litigation-induced delays of individual lease sales brought about by later judicial scrutiny of those consistency determinations.

¹ The federal defendants have appealed the district court's decision in *Kean v. Watt*, No. 82-2420 (D.N.J.) (Sale No. RS-2), which involves an OSC lease sale conducted prior to the Ninth Circuit's decision and thus went forward without a consistency determination. No. 82-5752 (3d Cir.). However, none of the tracts whose leasing the State of New Jersey opposes in that case were bid upon when the sale was conducted. The federal defendants have accordingly taken the position in the Third Circuit that their appeal of the trial court's broad interpretation of Section 307(c)(1), as well as a cross-appeal involving another issue concerning the scope of Section 307(c)(1), should be dismissed as moot.

3. Respondents assure this Court that the possibility of serious conflict between the States and the federal government over OCS leasing "is simply not supported" because state CZMA programs have been subjected to federal scrutiny prior to their approval and have been designed to allow for adequate consideration of the national interest in energy development. (Opp. 2-3, 28). The specific provisions of the California program upon which the State relied in challenging the Secretary of the Interior's Santa Maria Basin leasing decision themselves show the hollowness of this claim.

California referred below solely to Sections 30230 and 30240 of the California Coastal Act (Cal. Pub. Res. Code § 30,000 *et seq.*), both of which are incorporated within the California Coastal Management Program (CCMP), as barring the leasing of the disputed tracts. Those provisions state generally that

"[m]arine resources shall be maintained, enhanced, and, where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance"

and give no guidance as to the manner in which they will be applied in any particular case.

Similarly, Section 30260 of the Coastal Act, the provision of the CCMP which supposedly provides adequate consideration of the national interest in energy facility siting, states only that such energy facilities "may . . . be permitted . . . if . . . to do otherwise would adversely affect the public welfare." In this case, the California Coastal Commission simply found that the "public welfare" would not be adversely affected by deleting the northern Santa Maria Basin tracts from Sale No. 53. (C.R. 85; A.R. 217 w).

Thus, the CCMP itself resolves none of the policy conflicts associated with OCS development or other coastal-related activities.¹ Accordingly, the vague terms of California's coastal

¹ Respondents' argument that the courts in *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979), contemplated the use of such broad provisions

zone management program, like that of other states, only invite future litigation.

4a. Turning to the merits, it is first necessary to correct respondents' misstatements with respect to the position taken by the federal government as to Section 307(c)(1). Prior to 1979, the Department of the Interior did take the broad position that it was generally exempt from Section 307(c)(1) in the light of indications in the CZMA and the OCSLA that consistency was not required at the leasing stage of an OCS project. The National Oceanic and Atmospheric Administration (NOAA), the agency within the Department of Commerce charged with enforcement of the CZMA, disagreed. Moreover, NOAA had initially interpreted the phrase "directly affecting" as requiring CZMA consistency analysis for any effects of federal activities upon the coastal zone, whether "primary, secondary [or] cumulative" in nature. 43 Fed.Reg. 10518-19 (1978).

On April 19, 1979, the Department of Justice issued an opinion rejecting Interior's broad view that it was generally exempt from Section 307(c)(1). However, it also stated that it was unable "to concur in [NOAA's] interpretation that would dilute 'directly' first to 'significantly' and then to 'primarily, secondarily, and cumulative.'" (C.R. 85; A.R. 109 w at 14).

Pursuant to this Department of Justice opinion, NOAA withdrew its broad definition of the term "directly affecting." 44 Fed. Reg. 37,142 (1979).

Interior also changed its interpretation of Section 307(c)(1) and began scrutinizing every lease sale and the "preliminary activities" associated with that early stage of an OCS project to determine whether they involved any "direct effect" upon the

pursuant to Section 307(c)(1) to forestall federal activities, like an OCS lease sale (Opp. 3, 28), ignores the holding of those cases. Both the district and appellate court expressly refused to reach the issue of the enforceability of the CCMP in a Section 307 context, terming it "wholly speculative and thus not ripe for review." 456 F. Supp. at 897, 899, 903, *aff'd*, 609 F.2d at 1310.

coastal zone. (See WOGA petn. 11-12). Although on at least one occasion such preliminary activities were deemed to "directly affect" the coastal zone,¹ in this case, neither Interior nor the courts found that such preliminary activities "directly affect[ed]" the coastal zone.²

Thus, since the Department of Justice 1979 opinion, all agencies of the federal government have held the same view concerning the proper construction of the statute.³ It is this view which the federal defendants urged below and which the lower courts rejected.

b. Respondents continue to offer no definition of the term "directly" which gives it any content. Although respondents now contend that the "'direct effects' of a lease are the intended uses of the property leased—in this case oil and gas development on the [OCS]" (Opp. 10), they also argue that the Department's consistency determination must extend to such matters as the use of pipelines or tankers for transporting oil and the "heavy industrial activities associated with OCS development" (Opp. 15 n.23), presumably a reference to the "OCS-

¹ OCS Sale No. BF, the subject of litigation in *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980), involved the possible construction of gravel islands to support later exploration platforms in areas immediately adjoining the Alaska coastal zone during the leasing stage of the project. Thus, in 1979 a consistency determination pursuant to Section 307(c)(1) was provided to the State of Alaska to assess the coastal zone impacts of this particular portion of the Sale No. BF project.

² Having accepted the proposition that there is no general exemption for OCS leasing activities from Section 307(c)(1), the Department of the Interior has responded to the legislative history of the OCSLA described by respondents at pp. 21-22 of their opposition.

³ Respondents' reliance upon a Department of Commerce 1980 mediation report (Opp. 6 n.7) was properly not relied upon by the lower courts. As petitioners pointed out below, that report was specifically disapproved by the Secretary of Commerce as being beyond the mediator's jurisdiction. (Letter of Secretary Klutznick to Michael Fisher, April 9, 1980, Defendants Exh. L-AA.)

related onshore facilities" which the lower courts found were "direct effects" of leasing. (WOGA petn. 73a). In short, like both the district court and the Ninth Circuit, respondents adhere to the view that any effect that may ultimately occur during an OCS project is a "direct effect" of leasing.

c. Respondents argue that addressing consistency issues at the exploration and development-production stages of OCS projects will mean that CZMA "review is confined to plans for specific tracts submitted by each lessee" (Opp. 16), and will raise less the question of "whether drilling will proceed on the site than where and how it will proceed" (*Id.* at 5). There are several answers to this argument: First, until oil or gas is discovered on particular tracts, there is no way intelligently to address the pipeline placement, onshore infrastructure, and other issues associated with the later stages of OCS oil and gas production and development.¹ Second, an OCS lessee must comply with the CZMA at the later exploration or development/production stages or otherwise face disapproval of the plans that are necessary to proceed with those stages.² Third, even if Section 307(c)(3)(B) permits later-stage CZMA analysis to address only the question of "how," not "whether" OCS development should proceed, it seems unthinkable that Congress so carefully defined the limited "how" authority under Section 307(c)(3)(B), while silently conveying the much broader "whether" authority under the general terms of Section 307(c)(1).

¹ See *County of Suffolk v. Secretary of the Interior*, 562 F.2d at 1375-81, reversing a district court's order requiring even NEPA-type speculation about such issues at the leasing stage of an OCS project.

² Respondents observe that lessees often pay significant sums for leases, and cite this fact as though it demonstrates a clear nexus between leasing and the production of oil and gas from a particular OCS tract. (Opp. 12 & n.16). Respondents fail to note that, to date, in the majority of frontier areas, despite the expenditure of huge amounts by lessees for the acquisition of leases (*see* WOGA Petn. 13-14), no oil or gas in producible quantities has been discovered.

d. Respondents cite a 1971 Senate report which refers to a "functional interrelationship" between federal activities and the coastal zone (Opp. 24), and argue that this supports a broad reading of the "directly affecting" provision of Section 307(c)(1). However, the "functional interrelationship" referred to by the Senate report in 1971 concerned federal activities within those few acres of federal waters which for unusual reasons might divide portions of a state's coastal zone.¹ At no point in the legislative history of the original 1972 CZMA nor the 1976 amendments, when Section 307(c) was modified to deal with OCS projects, did Congress assume that all federal activities anywhere outside a state's coastal zone which might someday have a "functional interrelationship" with it would be subject to Section 307(c)(1) consistency review.²

¹ S. Rep. No. 526, 92d Cong., 1st Sess. 20 (1971).

² Respondents' reference to the Congress' scrutiny of NOAA's 1981 regulation on "directly affecting" (Opp. 23) is of no significance here. The sponsors of the resolutions of disapproval introduced in the Congress relied upon the district court's decision in this case. See, e.g., Hearings before the Subcomm. on Oceanography of the House Committee on Merchant Marine and Fisheries, 97th Cong., 1st Sess. 39-40, (1981) (statement of Rep. Panetta). Accordingly, the 1981 congressional resolutions, which were never voted on the floor of either House, do not provide any support for the decision below.

CONCLUSION

For the reasons stated above and in the petition, the Court should grant a writ of certiorari and hear this case on the merits.

Respectfully submitted,

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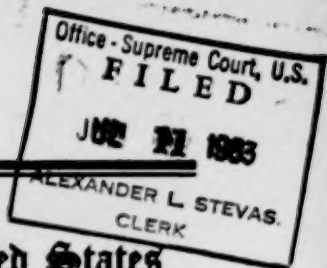
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,
v.
THE STATE OF CALIFORNIA, *et al.*,
Respondents.

**BRIEF OF PETITIONERS
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ET AL.**

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QUESTION PRESENTED

Whether the lower court erred in holding that the initial leasing stage of an Outer Continental Shelf (OCS) project "directly affect[s]" a state's coastal zone and must be preceded by a written determination that it can be conducted "to the maximum extent practicable, consistent with approved state management programs" pursuant to Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(1), because activities might be authorized at later stages of the project which could possibly affect the coastal zone?¹

PARTIES TO PROCEEDINGS BELOW

This litigation was instituted through separate, but virtually identical, complaints filed by the State of California, acting through Governor Brown, and five agencies of the State and by the Natural Resources Defense Council, Inc., the Sierra Club, Friends of the Earth, Friends of the Sea Otter, and the Environmental Coalition on Lease Sale No. 53.

Plaintiffs sued James G. Watt, the Secretary of the Interior, as well as Edward Hastey and Robert Burford, both of whom held positions within the Department of the Interior. Also named as defendants were the Department and its Bureau of Land Management.

Intervening as defendants and appearing as appellants in the Ninth Circuit were the Western Oil and Gas Association (WOGA), a regional trade association, and twelve of its members, Amoco Production Co., Atlantic Richfield Co., Champlin

¹ Petitioners also disagree with the Ninth Circuit's holding that environmental groups and local governments have standing to sue under Section 307(c)(1). However, since petitioners do not challenge California's standing, they did not present a question in their petition for certiorari concerning the standing of other parties. See *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 160 (1981).

Refining Co., Chevron U.S.A., Inc., Cities Service Co., Conoco, Inc., Elf Aquitaine Oil & Gas Co., Exxon Corp., Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co.²

Subsequently, various local governmental entities within California intervened as plaintiffs in the case commenced by the State: The Counties of Humboldt, Marin, Mendocino, Monterey, San Diego, San Francisco, San Luis Obispo, San Mateo, Santa Barbara, Santa Clara, Santa Cruz, and Sonoma; the Cities of Brisbane, Capitola, Carmel-by-the-Sea, Los Angeles, Morro Bay, Pismo Beach, San Francisco, San Luis Obispo, Santa Barbara, Santa Cruz, Santa Monica, and Seaside; and the Association of the Monterey Bay Area governments.

²The parties joining in this brief are WOGA, Amoco Production Co., Atlantic Richfield Co., Champlin Refining Co., Conoco, Inc., Elf Aquitaine Oil & Gas Co., Exxon Corp., Getty Oil Co., Gulf Oil Corp., Phillips Petroleum Co., and Shell Oil Co. Pursuant to Rule 28.1, the corporate parties named their parent companies, subsidiaries, and affiliates in their petition for certiorari at ii-v. To the best of counsel's knowledge, there have been no subsequent changes in the identified companies.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-1327

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

v.

THE STATE OF CALIFORNIA, *et al.*,
Respondents.

**BRIEF OF PETITIONERS
WESTERN OIL AND GAS ASSOCIATION,
ET AL.**

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 683 F.2d 1253 and is reprinted in Appendix A(1a) to the petition for certiorari. The opinion of the United States District Court for the Central District of California is reported at 520 F. Supp. 1359 and is reprinted in Appendix B(37a) to the petition.

JURISDICTION

On August 12, 1982, the United States Court of Appeals for the Ninth Circuit entered a judgment affirming in part, reversing in part, vacating in part, and staying in part the decision of the district court. The Ninth Circuit's judgment is reprinted in Appendix C(90a) to the petition for certiorari. On November 10, 1982, that court denied petitions for rehearing filed by California and the environmental group plaintiffs. The court's

order denying rehearing is reprinted in Appendix D(91a) to the petition.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 307(c)(1) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(c)(1), provides:

"Each Federal agency conducting or supporting activities directly affecting the coastal zone shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs."

Section 19 of the Outer Continental Shelf Lands Act (OCSLA), as amended, 43 U.S.C. § 1345, provides in pertinent part:

- "(a) Any Governor of an affected State or the executive of any affected local government in such State may submit recommendations to the Secretary [of the Interior] regarding the size, timing, or location of a proposed lease sale. . . .
- "(c) The Secretary shall accept recommendations of the Governor . . . if he determines, after having provided the opportunity for consultation, that they provide for a reasonable balance between the national interest and well-being of the citizens of the affected State. . . ."
- "(d) The Secretary's determination that recommendations provide, or do not provide, for a reasonable balance between the national interest and the well-being of the citizens of the affected State shall be final and shall not, alone, be a basis for invalidation of a proposed lease sale . . . unless found to be arbitrary or capricious."

STATEMENT OF THE CASE

This case requires the Court to decide to what extent, if any, a state administrative processes must be complied with by the Secretary of the Interior in selecting Outer Continental Shelf (OCS) tracts for leasing. California and its allies, advocating the view that this state process controls, challenge the Department of the Interior's decision to offer for leasing 29 (of 111) tracts in the Santa Maria Basin located on federal lands, more than three miles offshore the California counties of Santa Barbara and San Luis Obispo.

The lower courts held that the leasing of those tracts complied with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 (1976), that it did not violate the Endangered Species Act (ESA), 16 U.S.C. § 1531 (1976) or the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361, and that the Secretary of the Interior was not arbitrary or capricious in determining that the leasing of those tracts was in the national interest pursuant to Section 19 of the OCSLA, 43 U.S.C. § 1345.

While thus rejecting the arguments of California and its co-plaintiffs based upon these federal statutes, the lower courts agreed with their arguments that the Secretary had paid inadequate attention to a state administrative process in determining the selection of OCS tracts for leasing. Specifically, the district court and the Ninth Circuit, interpreting Section 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1), enjoined the Secretary of the Interior from leasing the 29 tracts complained of by California until he determines that their leasing is consistent, to the maximum extent practicable, with California's CZMA program.

A. Administrative Proceedings Prior To OCS Sale No. 53

1. Proceedings Before The Department Of The Interior

Planning for the leasing of Santa Maria Basin OCS tracts, designated OCS Sale No. 53, commenced in 1977.³ 42 Fed. Reg. 60794 (Nov. 29, 1977). In June 1980, a draft Environmental Impact Statement (EIS) was published which discussed oil and gas operations in the Santa Maria Basin, as well as four other basins located to the north—Eel River, Port Arena, Bodega Bay, and Santa Cruz. The final EIS for Sale No. 53 was completed in September 1980.

Paralleling the NEPA process, administrative proceedings were initiated under the ESA. Of relevance here, on September 8, 1980, the Fish and Wildlife Service (FWS) provided its biological opinion that neither leasing nor exploration in the Sale No. 53 area is "likely to jeopardize the continued existence of the [southern] sea otter," a "threatened species" under the ESA. C.R. 85; Administrative Record (A.R.) 183w at 14. The FWS went on to assert that, if leasing and exploration ultimately led to the development and production of oil in the region, it would be necessary to reinstitute consultation.

The Department of the Interior then commenced the process contemplated by Section 19 of the OCSLA. A Secretarial Issue Document (SID) was prepared to guide former Secretary Andrus' proposed selection of tracts for Sale No. 53. C.R. 19; Def. Ex. L-C. On October 16, 1980, he proposed to delete all of the tracts in the four northern basins from Sale No. 53, but to offer all of the Santa Maria Basin tracts for leasing. 45 Fed. Reg. 71139 (Oct. 27, 1980).

Section 19(b) of the OCSLA, 43 U.S.C. § 1345(b), provides that a governor may make "recommendations" as to the "size,

³ OCS tracts are leased for a term of years, not sold in fee simple. However, since the leases are auctioned to high bidders, the process of bidding is referred to as an "OCS lease-sale" or an "OCS sale." See 43 U.S.C. § 1337(a).

timing, or location of a proposed lease sale" within 60 days after receiving the Secretary's proposed leasing decision. On December 24, 1980, California's former Governor Brown recommended that 34 northern tracts in the Santa Maria Basin be deleted, since they "are directly seaward of the habitat, breeding and food supply areas of the Southern Sea Otter." (J.A. 81, 82).

After assuming office, Secretary Watt decided to reconsider Secretary Andrus' proposed Sale No. 53 decision. In doing so, he was advised by the Office of Fish, Wildlife and Parks that deletion of the 34 tracts referred to by Governor Brown "will have an insignificant impact on the risk" potentially created by the production and development of oil in that area. C.R. 85; A.R. 237w at 2. On February 10, 1981, Secretary Watt transmitted to Governor Brown a revised proposed notice of sale, which confirmed Secretary Andrus' decision to lease all Santa Maria tracts. Secretary Watt also tentatively reinserted the four northern basins into the sale. C.R. 85; A.R. 240w.

On April 7, 1981, Governor Brown responded to Secretary Watt's February 10 letter. C.R. 85; A.R. 405w. Governor Brown recited at length California's objections to leasing the four northern basins. *Id.* at 2-9. He also reiterated the position he had taken in his December 24 letter complaining of Secretary Andrus' decision to lease the 34 northern tracts of the Santa Maria Basin.

On April 10, 1981, Secretary Watt announced his Sale No. 53 decision. C.R. 85; A.R. 421w. As explained in his subsequent letter to Governor Brown (J.A. 135), he decided to delay leasing the four northern basins to give "thorough analysis and consideration" to the Governor's April 7 recommendations. *Id.* However, after "extensive examination of information relating to the proposed notice of sale issued last October on OCS offering #53, including the comments and recommendations in your letter of December 24, 1980," he decided to lease all Santa Maria Basin tracts. This decision was based upon an analysis which showed that the "national benefits far outweigh[ed] the potential for harm to the well-being of the citizens of Califor-

nia" associated with the production of oil and gas from the northern Santa Maria Basin tracts. *Id.*

On April 27, 1981, Interior published a final notice of sale soliciting sealed bids on all Santa Maria Basin tracts and setting May 28, 1981, as the date upon which they would be opened. 46 Fed. Reg. 23673.

2. The State CZMA Process

On November 7, 1977, the Acting Assistant Administrator of the National Oceanic and Atmospheric Administration (NOAA), exercising authority delegated to him by the Secretary of Commerce, approved the California Coastal Management Program (CCMP) pursuant to Section 306 of the CZMA, 16 U.S.C. § 1455. *See American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 893-94 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). California thereby became the first State to have a federally-approved CZMA program, thus empowering California to insist, under Section 307(c)(1) of the CZMA, that all federal activities "directly affecting" the California coastal zone be conducted in a manner "consistent to the maximum extent practicable" with the CCMP.

Applying a restrictive standard of judicial review, both the district court and the Ninth Circuit rejected judicial challenges to NOAA's approval of the CCMP. *American Petroleum Institute v. Knecht*, 456 F. Supp. 889, 609 F.2d 1306.

"[U]nder our so-called federal system, the Congress is constitutionally empowered to launch programs the scope, impact, consequences and workability of which are largely unknown, at least to the Congress, at the time of enactment; the federal bureaucracy is legally permitted to execute the congressional mandate with a high degree of befuddlement as long as it acts no more befuddled than the Congress must reasonably have anticipated; if ultimate execution of the congressional mandate requires interaction between federal and state bureaucracy, the resultant

maze is one of the prices required under the system." 456 F. Supp. at 931.⁴

The CCMP which survived this restricted judicial review did not specify which land and water uses in the coastal zone the State would later find consistent with its program. Indeed, the district court agreed with California

"that Congress never intended that to be approvable under § 306 a management program must provide a 'zoning map' which would inflexibly commit the state in advance of receiving specific proposals to permit particular activities in specific areas. Nor did Congress intend by using the language of 'objectives, policies and standards' to require that such programs establish such detailed criteria that private users be able to rely on them as predictive devices for determining the fate of projects without interaction between the relevant state agencies and the user." 456 F. Supp. at 919.

⁴ The district court's unusually candid description of the CZMA legislative scheme and administrative process further confirms that its rejection of the judicial attack upon the CCMP was based upon the highly deferential standard of review that it felt obliged to exercise:

"The court has before it for determination . . . questions of the highest importance, greatest complexity, and highest urgency. They arise as a result of high legislative purpose, low bureaucratic bungling, and present inherent difficulty in judicial determination. . . . [F]or the high purpose of improving and maintaining felicitous conditions in the coastal areas of the United States, the Congress has undertaken a legislative solution, the application of which is so complex as to make it wholly unmanageable. In the course of the legislative process, there obviously came into conflict many competing interests which, in typical fashion, the Congress sought to accommodate, only to create thereby a morass of problems between the private sector, the public sector, the federal bureaucracy, the state legislature, the state bureaucracy, and all of the administrative agencies appurtenant thereto." 456 F. Supp. at 895-6.

Representative of its general nature, the provision of the CCMP, upon which California principally relies in this case in challenging the leasing of the 29 disputed tracts, states that:

"Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes." Cal. Pub. Res. Code § 30230 (1976).

On July 8, 1980, California commenced efforts to use its CZMA program to restrict Secretary Andrus' selection of Sale No. 53 tracts for leasing. It took the position that OCS lease sales are federal "activities directly affecting" the coastal zone within the meaning of Section 307(c)(1). The Secretary was accordingly asked to make a "consistency determination" that his selection of tracts for OCS Sale No. 53 would be consistent to the maximum extent practicable with the CCMP. (J.A. 63).⁵

On October 22, 1980, an Assistant Secretary of the Interior responded to this request, stating that Interior had "assessed the possible effects of the Department's pre-lease activities [including tract selection] associated with OCS Lease Sale No. 53 and found that none directly affects the California coastal zone." (J.A. 66). Explaining this finding, he said that the Department had determined that

"no lessee will be required, as a result of and as the next step following lease award, to undertake an activity with coastal zone effects. In all cases the lessee and the Deputy Conservation Manager must first exercise discretion by making subsequent decisions to initiate for approval and to approve specific action proposals before the coastal zone could be affected." (J.A. 66).

⁵ The requirement of preparing a "consistency determination" for federal activities "directly affecting the coastal zone" arises out of regulations, not the CZMA itself. See 15 C.F.R. §§ 930.34, 930.39(a).

Although thus rebuffed in its efforts to obtain a consistency determination from the Department of the Interior, the California Coastal Commission (CCC), the state agency which administers the CCMP, nevertheless proceeded to recite its own views as to the consistency of leasing tracts included within the Santa Maria Basin. On December 16, 1980, it adopted a resolution objecting to leasing those 31 northern tracts in the Santa Maria Basin within 12 miles of the range of the southern sea otter. (J.A. 73). This position was grounded upon the CCC's assessment of the national interest:

"weighing the national interest in protecting the small population of the threatened southern sea otter against the petroleum resource potential of the 31 tracts in the northern part of the Santa Maria Basin comes out in favor of the threatened sea otter. . . ." (J.A. 76).

In so opposing the leasing of these Santa Maria Basin tracts, the CCC did not quarrel with the adequacy of the EIS or with the biological opinion rendered by the FWS, both of which demonstrated that leasing and exploration could go forward without jeopardy to the sea otter.

Secretary Watt's tentative reinsertion of the four northern basins into the proposed sale prompted another CCC resolution. On March 31, 1981, it resolved that leasing of the four northern basins would not be consistent with the CCMP. (J.A. 109). The CCC also reiterated its opposition to the inclusion of the 31 northern tracts in the Santa Maria Basin. (J.A. 110).

In finding a lack of consistency as to the 31 disputed Santa Maria Basin tracts, the CCC identified Section 30230 of the California Coastal Act as the "main part of the CCMP that addresses protection of marine resources." See p. 8, *supra*. The CCC then asserted that this provision of the CCMP mandated a 12-mile buffer zone between the sea-otter habitat and OCS leasing. (J.A. 122).

The CCC also referred to Section 30240 of the Coastal Act, Cal. Pub. Res. Code § 30240, which provides that "environmentally sensitive habitat areas shall be protected"

and stated that this section barred OCS leasing within six miles of marine mammal and sea bird breeding areas and within 12 miles of the southern sea otter, since, in the CCC's view, there were "deficiencies in oil spill control equipment and procedures." (J.A. 124). The Commission made no findings to support its choice of a 12-mile zone for sea otters nor of the less restrictive zone for other species.

Finally, the CCC recognized that Section 30260 of the Coastal Act, Cal. Pub. Res. Code § 30260, allows the location of coastal-dependent industrial facilities in or near the coastal zone, notwithstanding other provisions of the CCMP, if alternative locations are infeasible, if adverse environmental effects are mitigated to the maximum extent feasible, and if "to do otherwise would adversely affect the public welfare." Recognizing that OCS tracts are not capable of being located elsewhere and apparently satisfied with the mitigating measures proposed for the Santa Maria Basin, the CCC found that these two requirements of Section 30260 were met. However, finding that the "public welfare" referred to in the CCMP is "analogous to the national interest" (J.A. 127), the CCC declared that the national interest did not permit the leasing of any tracts within 12 miles of the sea otter habitat. The CCC's conception of the national interest was based upon the FWS biological opinion as to the sea otter, even though it had found that leasing would not jeopardize the species, and upon the "decided national interest in protecting a federally designated threatened species." (J.A. 129).

B. Proceedings In The Lower Courts

1. The District Court's Decision

On April 29, 1981, California and various environmental groups filed separate complaints seeking an injunction against leasing the 34 northernmost Santa Maria Basin tracts referred to in Governor Brown's OCSLA Section 19 recommendations to the Secretary. This part of plaintiffs' suit was grounded in the OCSLA, NEPA, ESA, and MMPA. Plaintiffs also sought an injunction against leasing 31 of those 34 tracts on the basis of

the positions staked out by the CCC in interpreting the CCMP.⁶

On May 27, 1981, acting on plaintiffs' motions for preliminary injunction, the district court ruled that plaintiffs had not shown a probability of success on their OCSLA, NEPA, ESA, or MMPA claims. However, it held that plaintiffs would probably succeed on their CZMA theory that OCS leasing is an activity "directly affecting" the coastal zone and thus cannot be conducted in the absence of a determination that leasing will be consistent with an approved CZMA program. The court, therefore, entered a preliminary injunction which allowed bids on the CZMA-challenged tracts to be opened, but enjoined the Secretary from accepting those bids.

On May 28, 1981, the Santa Maria Basin lease sale took place as scheduled.⁷ Bids on 19 of the CZMA-challenged tracts were submitted. Collectively, the high bids on those tracts totalled more than \$220 million. Pursuant to Department of the Interior regulations, 20% of this amount—\$44 million—was deposited with those high bids.⁸

On August 18, 1981, the district court entered summary judgment for defendants with respect to all but one of plaintiffs' challenges to Sale No. 53. The court found that the EIS for the sale satisfied NEPA. (74a-77a). It ruled that the Secretary had correctly determined under the ESA that OCS Sale No. 53 would not jeopardize the southern sea otter, recognizing that it

⁶ A number of local governments from the California coastal region intervened as plaintiffs in the case initiated by California. Western Oil and Gas Association and 12 of its members intervened as defendants in both the California and environmental group action.

⁷ The final notice consolidated the 115 tracts that had been described in the proposed notice sent to Governor Brown into 111 tracts covering precisely the same area. By virtue of this consolidation, the 34 tracts complained of by the Governor were reduced to 32 and the 31 focused upon by the CCC were reduced to 29.

⁸ 43 C.F.R. § 3316.4.

was not necessary, at the leasing stage of the project, to deal with jeopardy issues that could arise only at the later development/production stage of the project. (82a-85a). The court held that OCS Sale No. 53 would not constitute a prohibited taking under Section 9 of the ESA or the MMPA. (85a-86a). Finally, the court acknowledged that the Secretary had undertaken a balance of the national interest against the interest of the citizens of California in deciding pursuant to Section 19 of the OCSLA not to adopt all of Governor Brown's recommendations as to tract deletions. (77a-81a).

The district court then proceeded, however, to enter summary judgment for California and the local governments on their CZMA claim. It found that the Department of the Interior's leasing of OCS tracts "would invariably directly affect the coastal zone in all but the most unusual case—a case which probably could only be posed as a hypothetical. . . ." (71a). The lower court refused to enter a judgment for the environmental groups on this claim, holding that they did not have standing to invoke the CZMA. (89a).

In ruling for California on its CZMA claim, the trial court did not identify any physical activity affecting the coastal zone which the Department of the Interior would conduct at the leasing or any other stage of the OCS Sale No. 53 project, nor did it identify any activities which OCS lessees might be expected to conduct immediately after obtaining their leases. Instead, in the trial court's view, the "direct" effects which triggered Section 307(c)(1) were the potential impacts that might arise at the later stages of the Sale No. 53 project, principally development/production when oil is first produced and transported to shore. (72a-73a). Since Interior had not determined that these potential impacts were consistent with the CCMP, the court issued a permanent injunction cancelling the sale of all CZMA-challenged tracts.⁹

⁹ The district court stayed its injunction to provide defendants an opportunity to apply to the Ninth Circuit for a stay pending appeal. On August 26, 1981, that court granted that stay.

2. The Ninth Circuit's Decision

Both sides filed cross-appeals, defendants seeking review of the district court's ruling under Section 307(c)(1) of the CZMA, plaintiffs challenging its judgment for defendants under NEPA and the OCSLA. The environmental groups also sought review of the district court's decision that they did not have standing to sue under the CZMA.

On August 12, 1982, the Ninth Circuit rendered its opinion. (1a). Adopting the district court's reasoning and its characterization of the "direct" effects of an OCS lease sale, the court of appeals held that the Secretary's decision to select particular tracts for leasing "established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased." (14a).

Although agreeing with the district court that Section 307(c)(1) thus required the Department of the Interior to make a consistency determination before proceeding with leasing, the court of appeals, unlike the district court, held that federal activities need be consistent with a state CZMA program only "to the maximum extent practicable." (21a, 24a). The Ninth Circuit based this construction of the CZMA upon its recognition that Congress in the "1953 Compromise" of the "Tidelands Oil Issue" had resolved the controversy between the States and the federal government as to ownership of the OCS and had declared "the paramountcy of the national interest." (25a).

The Ninth Circuit did not venture beyond this assertion of federal "paramountcy" to delineate how it might be upheld in specific future disputes with States seeking to apply their CZMA programs to OCS leasing. Stating that "verbal formulas cannot eliminate the necessity of examining each situation with care," the court noted that future disagreements between the States and federal agencies concerning consistency determinations would be subject to mediation within the Department of Commerce. (24a). Although the Ninth Circuit did not refer to them, applicable regulations defining mediation procedures, 15 C.F.R. § 930.43, make it clear that they are

voluntary, nonbinding, and, in serious disputes, merely a prelude to later federal litigation.¹⁰

After thus disposing of the merits of the CZMA dispute, the court held that environmental groups have standing under the Administrative Procedure Act (APA), 5 U.S.C. § 702, to institute litigation demanding the preparation of a consistency determination for OCS leasing.¹¹

The Ninth Circuit affirmed the trial court's ruling for defendants under both NEPA and Section 19 of the OCSLA. As to the latter, it recognized the narrow scope of review open to a

¹⁰ The legislative history of Section 307(h), the mediation provision of the CZMA cited by the Ninth Circuit (25a), casts further doubt upon the Ninth Circuit's reliance on mediation as the congressionally-selected device to resolve disputes under Section 307(c)(1). Section 307(h) was added to the statute in 1976, four years after Section 307(c)(1) was enacted. In 1972, Section 307(b) contained a mediation provision, but it applied only to the development of CZMA programs, not to their implementation in specific consistency disputes. See Coastal Zone Management Act of 1972, P.L. No. 92-583, § 307(b), 86 Stat. 1280, 1285. Accordingly, at the time that Congress gave States the authority perceived by the Ninth Circuit to apply their CZMA programs to OCS leasing, it did not provide for any mediation with respect to application of those programs to federal activities.

The Ninth Circuit's reliance upon the Secretary of Commerce appeal provisions of Section 307(c)(3) of the CZMA, 16 U.S.C. § 1456(c)(3), as a device to resolve Section 307(c)(1) consistency disputes is equally erroneous. By its terms, that section applies only to disputes between private entities, who seek federal licenses or permits, and state CZMA agencies.

¹¹ The court stayed the district court's injunction cancelling the CZMA-disputed portion of the Santa Maria Basin sale, pending the Department of the Interior's preparation of a determination that its decision to lease the northern Santa Maria Basin tracts was consistent to the maximum extent practicable with the CCMP. The court of appeals left open the question whether it would uphold the district court's cancellation of the sale, if it were to disagree with the consistency determination. (26a).

court and upheld the Secretary of the Interior's rejection of the Governor's recommendations to delete the northern Santa Maria Basin tracts and his determination that the leasing of those tracts was in the national interest. (30a-31a).¹²

SUMMARY OF ARGUMENT

A long standing political controversy regarding the leasing of offshore lands was resolved definitively by Congress in 1953 when it passed the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*, and the original OCSLA. That legislation granted coastal states ownership of submerged lands within three miles (or in two instances three leagues) of their coasts, 43 U.S.C. §§ 1301(a), 1311(a), but reserved for the federal government proprietary control over the soil and seabed of the OCS outside this coastal zone, 43 U.S.C. §§ 1302, 1332(a). This Court has held that the Submerged Lands Act constituted an "exercise of a paramount national authority" over OCS lying beyond the three-mile limit. *United States v. Maine*, 420 U.S. 515, 525 (1975). Absent a clear statement of its intention to do so, it should not be assumed that Congress, in adopting the CZMA, intended to give the States any measure of authority over OCS leasing.

Not only does the CZMA contain no such clear statement, but when it is read with the OCSLA, it is clear that Congress did not contemplate that a state CZMA program would constrain the Secretary of the Interior's selection of OCS tracts for leasing.

The OCSLA specifies the role to be played by States at every stage of the OCS process. The OCSLA makes no provision for applying state CZMA programs to the selection of OCS tracts

¹² On petitions for rehearing, plaintiffs argued that the Ninth Circuit had misconstrued the term "maximum extent practicable" in Section 307(c)(1) when it rejected their claim that the Department of the Interior must conform to a state's interpretation of its CZMA program. On November 10, 1982, the Ninth Circuit denied plaintiffs' petitions for rehearing without opinion.

for leasing, but instead permits Governors to make recommendations as to such selections, while reserving "final" authority for the Secretary of the Interior to accept or reject those recommendations. The OCSLA provides for the application of state CZMA programs only at the later exploration and production/development stages of an OCS project.

Like the OCSLA, the CZMA is silent as to the application of CZMA programs at the leasing stage of an OCS project, while explicitly providing for their application at the exploration and production/development stages. Moreover, the plain meaning of the terms of Section 307(c)(1) that only activities "directly affecting" coastal zones are subject to CZMA programs demonstrates that the Secretary of the Interior's selection of OCS tracts is not subject to that section.

Such OCS tract selection does not "directly affect . . ." a state's coastal zone. The effects upon state coastal zones associated with OCS projects instead arise from the actions of OCS lessees, who, acting pursuant to federal licenses or permits, commence the exploration and production/development stages of an OCS project. These physical impacts upon a state's coastal zone, which cannot occur until a state exercises CZMA review under Section 307(c)(3)(B), are not "direct" effects of OCS leasing itself.

Consistent with the plain meaning of Section 307(c)(1), the legislative history of that provision shows that Congress, in 1972 when it adopted that section, gave no indication whatever that it would apply to OCS leasing. Similarly, when Congress in 1976 specifically amended Section 307(c) to apply to OCS projects, it rejected a proposal that the issuance of OCS leasing be subject to state CZMA programs, and instead provided only that the later exploration and development/production stages of an OCS project would be subject to Section 307(c). Nothing asserted by Congressional Committees in 1980 as to the purported scope of the 1972 version of Section 307(c)(1) is of any pertinence in this case, since in 1980 Congress did not even attempt to amend Section 307(c).

Finally, policy considerations do not support the construction of the CZMA embraced by the lower courts. Application of the CZMA to OCS leasing in the manner envisioned below would erect substantial litigation impediments to the development of OCS energy resources, thus contravening the basic purpose of the 1978 OCSLA amendments to promote the swift, orderly and efficient exploitation of the oil and gas resources of the OCS.

ARGUMENT

I. THE 1953 COMPROMISE OF THE TIDELANDS OIL ISSUE SHOULD NOT BE UNDERMINED BY A CONSTRUCTION OF THE CZMA VESTING AUTHORITY IN STATES TO APPLY THEIR CZMA PROGRAMS TO CHALLENGE THE SECRETARY OF THE INTERIOR'S SELECTION OF OCS TRACTS FOR LEASING.

The Ninth Circuit recognized that a full consideration of the language and purposes of the OCSLA and CZMA leads to the conclusion that the CZMA

"does not provide that a state's plan takes precedence when it would preclude the federal activity, or even that the federal activity must be as consistent with the plan as is *possible*."

"[S]uch authority [to determine consistency] must reside in the Executive Branch of the federal government subject, of course, to such judicial review as is appropriate. To hold otherwise on the basis of silence, or at best attenuated inferences drawn from the language of Congress, weighs too lightly the interests of the Nation against that of a state." (21a, emphasis in original).

In so construing the CZMA, the Ninth Circuit properly referred to the so-called "1953 Compromise" of the "Tidelands Oil Issue," which granted coastal states ownership of submerged lands within three miles (or in two instances three leagues) of their coasts, 43 U.S.C. §§ 1301(a), 1311(a), but reserved for the federal government exclusive proprietary

control over the soil and seabed of the OCS outside this zone, 43 U.S.C. §§ 1302, 1332(a). (22a-23a). The court recognized that the CZMA was explicitly conditioned so as not to change this division of authority between the state and federal governments over OCS federal lands, citing Section 307(e) of the CZMA, 16 U.S.C. § 307(e). (23a).

The Ninth Circuit's perception of the significance of the 1953 Compromise of the Tidelands Oil Issue was plainly correct. In rejecting the claims of the eastern seaboard States to ownership of the OCS, this Court stressed that the Submerged Lands Act of 1953, 43 U.S.C. § 1301, constituted a "further exercise of paramount national authority" over the OCS lands lying beyond the three-mile limit. *United States v. Maine*, 420 U.S. 515, 525 (1975). It went on to note that the second phase of the 1953 Compromise, enactment of the original OCSLA, constituted an "emphatic" implementation by Congress of "its view that the United States has paramount rights to the seabed beyond the three-mile limit" 420 U.S. at 525. The Court has in recent cases reiterated these principles. See *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 n.7 (1981); *Maryland v. Louisiana*, 451 U.S. 725, 752-53 n.26 (1981).

Since the 1953 Compromise so clearly left the States with no decisional authority as to the selection of OCS tracts for leasing, it should be assumed that Congress, in adopting the CZMA, did not intend to give the States any measure of authority over OCS leasing, absent a clear statement of its intention to do so. See *Ruckelshaus v. Sierra Club*, ____ U.S. ____, 51 U.S.L.W. 5132 (July 1, 1983); *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 285 (1973); *Industrial Union Dept. AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 645-46 (1980); *Illinois v. General Electric Co.*, 683 F.2d 206, 215-16 (7th Cir. 1982). The Ninth Circuit correctly read the CZMA as lacking such a clear statement.

Where the Ninth Circuit erred in this case was in determining that Congress chose to preserve ultimate federal control over the OCS by adopting the "maximum extent practicable"

limitation upon the consistency required by Section 307(c)(1). The Ninth Circuit itself recognized the imprecision of this term. It conceded that the limits of conformity with a state plan implied by it "cannot be precisely delineated," so that it would be necessary to "examine each situation with care and sensitivity to the concerns of the state and the nation," in future cases challenging the Secretary's selection of particular OCS tracts. (24a).

The Ninth Circuit's selection of the "maximum extent practicable" qualification to Section 307(c)(1) as the wavering line of demarcation between state and federal authority over the selection of OCS tracts for leasing cannot be reconciled with the court's recognition that Congress resolved the Tidelands Oil Issue so as to give the federal government "exclusive proprietary control over 'the soil and seabed of the Continental Shelf' outside this three-mile zone." (23a). Obviously, requiring the federal government to select OCS tracts for leasing in a fashion that is in any degree consistent with state CZMA programs confers some proprietary control upon the States.

Moreover, as this Court recognized in *United States v. Maine*, 420 U.S. at 527, "a principal purpose of [the 1953 Compromise] was to resolve the 'interminable litigation' arising over the controversy of the ownership of the lands underlying the marginal sea." Given the amorphous nature of state CZMA programs, which courts have felt obliged to leave intact in the light of the equally vague provisions of the CZMA, see *American Petroleum Institute v. Knecht*, 456 F. Supp. at 931, and the uncertain contours, as recognized by the Ninth Circuit itself, of the phrase "maximum extent practicable,"¹³ the lower

¹³ In a closely related context, the D.C. Circuit recognized that the "maximum extent practicable" qualification of the Secretary of the Interior's duties with respect to OCS leasing reflected the difficult burden that he must shoulder in balancing non-quantifiable environmental and social costs against potential OCS resource benefits.

court's construction of the CZMA would replace one form of "interminable [OCS] litigation" with another.¹⁴

As we will show, there is no basis in the CZMA or OCSLA for believing that Congress, at any time when it originally enacted those statutes or subsequently amended them, contemplated that the Secretary of the Interior's selection of OCS tracts for leasing would in any respect be influenced by state CZMA programs. Had the Ninth Circuit, therefore, pursued

California v. Watt, 668 F.2d 1290, 1317 (D.C. Cir. 1981), *interpreting* Section 18(a)(3) of the OCSLA, 43 U.S.C. § 1344(a)(3).

¹⁴ As this Court was advised in the briefing of the petitions for certiorari, the Department of the Interior has prepared consistency determinations pursuant to Section 307(c)(1) for all OCS lease sales, since the Ninth Circuit rendered its decision in this case. (See Fed. Petn. in No. 82-1326 at 19 n.18). Several States have already instituted litigation challenging the adequacy of these consistency determinations by arguing that they did not give adequate weight to purportedly binding provisions of state CZMA programs. In *Conservation Law Foundation v. Watt*, 560 F. Supp. 561 (D. Mass 1983), *appeals pending*, No. 83-1258 (1st Cir.), the State invoked a policy of its program, which required it to "accommodate exploration, development and production of offshore oil and gas resources while minimizing impacts on the marine environment," as a basis for challenging the Secretary of the Interior's selection of 57 (out of 488) tracts included within an OCS lease sale off Massachusetts. The district court enjoined the Secretary of the Interior's leasing of these challenged tracts on the ground that the consistency determination had not sufficiently explained the Department of the Interior's reasons for rejecting the state's construction of its CZMA program. 560 F. Supp. at 578.

Subsequently, suits were filed by New York, Maryland, and Virginia against OCS Lease Sale No. 76 (Mid-Atlantic) mounting similar challenges under their CZMA programs to the Secretary of the Interior's selection of OCS tracts for leasing. *New York v. Watt*, No. 83 Civ. 1523 (S.D.N.Y.); *Maryland v. Watt*, No. 83-1180 (D. D.C.) (*dismissed as moot*); *Virginia v. Watt*, No. 83-284-N (E.D. Va.) (*dismissed as moot*).

the implications of its perception that Congress should not lightly be presumed to have undone the political compromise of the Tidelands Oil Issue, it would have been driven to the conclusion that Section 307(c)(1) does not apply to the selection of OCS tracts for leasing.

Indeed, that court would have reached this conclusion had it simply recognized that its obligation was to abide by the plain meaning of the explicit terms of the applicable statutes. See *Griffin v. Oceanic Contractors, Inc.*, ____ U.S. ____, 102 S. Ct. 3245, 3250 (1982).¹⁵

II. THE OCSLA DOES NOT CONTEMPLATE STATE INVOCATION OF CZMA PROGRAMS TO INFLUENCE THE SECRETARY OF THE INTERIOR'S SELECTION OF OCS TRACTS FOR LEASING.

Resolution of the issue presented in this case requires scrutiny of two statutory schemes: the CZMA and OCSLA. In this respect, this case is no different than many others where Congress has enacted two or more statutes bearing upon a particular activity. However, in this case, Congress has provided with unusual clarity how these two schemes are intended to relate to each other.

Since the 1978 amendment of the OCSLA is the most comprehensive, most specifically directed toward OCS leasing, and most recently amended of the two relevant statutes, conventional principles suggest that its terms should be given initial scrutiny in deciding the issue presented here. See p. 32, *infra*. Moreover, since it is the OCSLA which carries forward the terms of the 1953 Compromise in fixing the bounds of state

¹⁵ See also *Bowsher v. Merck & Co.*, ____ U.S. ____, 103 S. Ct. 1587, 1591-92 (1983); *Watt v. Energy Action Educational Foundation*, 454 U.S. 151, 162 (1981); *CBS v. FCC*, 453 U.S. 367, 377-79 (1981); *United States v. Turkette*, 452 U.S. 576, 580 (1981); *American Textile Manufacturers Institute, Inc. v. Donovan*, 452 U.S. 490, 508 (1981); *Howe v. Smith*, 452 U.S. 473, 488 (1981).

and federal authority over OCS leasing, the Court should look first to its provisions in determining whether Congress has clearly stated an intention to modify that compromise.

A. The OCSLA Specifies In Detail The Role To Be Played By States At Every Stage Of The OCS Process And Makes No Provision For Applying CZMA Programs To The Selection Of Tracts For Leasing.

The Ninth Circuit, like the district court, justified its construction of Section 307(c)(1) of the CZMA as extending to OCS leasing on the basis that a major purpose of that statute was to encourage cooperation between the federal and state governments and that "to effectuate this purpose, the state must be permitted to become involved in an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone." (15a). The court rejected defendants' purportedly "narrow" construction of Section 307(c)(1) as not extending to leasing on the basis that it would "preclude this early involvement."¹⁶ In so approaching the issue in this case and assuming that federal-state cooperation had to be premised on an expansive construction of Section 307(c)(1), the Ninth Circuit ignored the OCSLA's explicit provisions for state involvement in the OCS process.

One of the basic purposes motivating congressional amendment of the OCSLA in 1978 was to

"assure that states . . . which are directly affected by exploration, development, and production of oil and natu-

¹⁶ This Court has recently rejected an argument that "a general policy of encouraging federal/state cooperation" justifies ignoring the specific terms of a federal statute. *Illinois v. Abbott & Associates, Inc.*, ___ U.S. ___, 103 S. Ct. 1356, 1364 (1983). Although endorsing "the general goals of enhancing federal/state cooperation," the Court ruled that such goals "do not authorize us to add specific language that Congress did not include in a carefully considered statute." *Id.* at 1364.

ral gas are provided an opportunity to participate in policy and planning decisions relating to management of the resources of the [OCS]." 43 U.S.C. § 1802(6).

To achieve this end, Congress designed appropriate state participation for every stage of the OCS process, and provided for state involvement in the selection of tracts for leasing that is more limited than that discerned in the CZMA by the lower courts.¹⁷

1. The Five-Year Leasing Program Stage—Section 18

"Affected states" within the meaning of Section 201(f) of the OCSLA, 43 U.S.C. § 1331(f)—*i.e.*, those "in which there is a substantial probability of significant impact . . . resulting from the exploration, development, and production of oil and gas anywhere on the [OCS]"—are given a role in the earliest phase of the OCS process, when the Secretary of the Interior adopts a five-year OCS leasing schedule describing the size, timing and location of future lease sales. See Section 18(a) of the OCSLA, 43 U.S.C. § 1344(a). At this point, affected States are permitted to submit comments to the Secretary with respect to his leasing program and to request its modification. The Secretary is, in turn, directed to reply in writing to such requests, stating his reasons for agreeing or disagreeing with them, and must submit his correspondence with the governors to Congress for its scrutiny. 43 U.S.C. § 1344(c) & (d).¹⁸

¹⁷ This approach to state involvement in OCS decision-making was carefully tailored by Congress. As Representative Murphy, sponsor of the House bill, emphasized:

"[This] is a long, detailed and well-considered bill. It is the result of 3 years of extensive hearings, in which the select committee heard more than 375 witnesses and compiled a hearing record totaling more than 10,000 pages, and months of markup, in which the committee considered hundreds of amendments. It is a bill which, if enacted, can make a profound contribution to the solution of the Nation's energy crisis and do so in a manner that takes into account the needs of our states and the protection of our marine and coastal environment." 124 Cong. Rec. 816 (1978).

¹⁸ Affected States or other parties in interest are also empowered to institute judicial review proceedings in the D.C. Circuit to chal-

The promulgation of the Secretary's five-year leasing program is the "first link" in the OCS process, as the Ninth Circuit used that term, inasmuch as no lease sale can be conducted within the ensuing five years unless it is identified on that program. 43 U.S.C. § 1344(d)(3). Nonetheless, the D.C. Circuit rejected California's claims that the Secretary had to consult California's program prior to including OCS Sale No. 53, on his program. *California v. Watt*, 668 F.2d 1290, 1310-11 (D.C. Cir. 1981). Instead, that court held that States are limited to participation through the commenting process specifically provided in Section 18(c) & (d) of the OCSLA, at the five-year leasing program stage of the OCS process.

2. The Leasing Stage—Section 19

"Affected states" are also assigned a specific role at the leasing stage of the OCS process, when the Secretary of the Interior selects particular tracts for leasing. Section 19(a) of the OCSLA, 43 U.S.C. § 1345(a), provides States with the "opportunity to participate in policy and planning decisions relating to management of the resources of the [OCS]," 43 U.S.C. § 1802(6), by permitting governors to submit "recommendations" to the Secretary regarding the "size, timing, or location" of OCS lease sales.

The Secretary is directed to give greater weight to these "recommendations" of governors than to their "comments" on the five-year leasing program. Under Section 19(c) of the statute, he must determine whether these recommendations "provide for a reasonable balance between the national interest and

lenge the Secretary's five-year OCS leasing program. In *California v. Watt*, 668 F.2d 1290, 1326 n.176 (D.C. Cir. 1981), the court rejected California's challenge to the inclusion of OCS Sale No. 53 in Secretary Andrus' 1980 leasing program. Moreover, on July 5, 1983, that court handed down its opinion rejecting California's, other states', and other parties' attacks upon Secretary Watt's 1982 five-year OCS leasing program. *California v. Watt*, No. 82-1822, (D.C. Cir.).

the well-being of the citizens of the affected state." 43 U.S.C. § 1345(c). If so, the Secretary is directed to accept them. Moreover, the Secretary must communicate to the governor in writing his reasons for accepting or rejecting the governor's recommendations.

While thus ensuring that gubernatorial recommendations as to the size, timing and location of leasing will be accepted by the Secretary, if they provide for the appropriate balance set forth in the Act, Congress mandated that the Secretary's determination of the "reasonable balance between the national interest and the well-being of the citizens of the affected states shall be final," subject to a limited "arbitrary or capricious" standard of review. 43 U.S.C. § 1345(d).

In so defining the states' role and the Secretary's ultimate balancing responsibility, Congress made no provision for the application of state CZMA programs in connection with the Secretary's selection of tracts for leasing. Manifestly, Congress did not contemplate that a state agency, like the CCC, could through its own assessment of the national interest contradict the Secretary's decision. To the contrary, the framers of the 1978 Amendments to the OCSLA stressed repeatedly that no veto authority for the States was envisioned:

"The intent of the committee is to insure that the Secretary give thorough consideration to the voices of responsible regional and local State officials in planning OCS leasing and development. The committee did not believe that any State should have a veto power over OCS oil and gas activities." S. Rep. No. 284, 95th Cong., 1st Sess. 78 (1977).

Representative Murphy, chief sponsor of the bill in the House, similarly explained:

"The conference report [through OCSLA § 19] would open Interior's decisionmaking process so that relevant outsiders—and in particular, State governments and through states, local government—may present their views and must be heard. They would not have a veto—only an opportunity to present their views and assurances

that those views will be considered." 124 Cong. Rec. 26778 (1978).¹⁹

Recognition of the primacy of the Secretary's authority at the leasing stage implied by Section 19 by no means entitles a Secretary of the Interior to proceed with OCS leasing in disregard of state CZMA programs. As the record in this case

¹⁹ Throughout this litigation, California has failed to produce any OCSLA legislative history reflecting a congressional intent to permit states to apply their CZMA programs to control the Secretary's selection of tracts for leasing. It has identified one footnote in a House Report in which the Committee expressed its awareness that "under the [CZMA] . . . certain activities including lease sales and approval of development and production plans must comply with 'consistency' requirements. . . ." H. Rep. 590, 9th Cong., 1st Sess. 153 n.52 (1977). This footnote is plainly an insufficient foundation for California's argument that Section 307(c)(1) of the CZMA, not Section 19 of the OCSLA, is the vehicle chosen by Congress for state input into the Secretary's tract-selection decision for two separate reasons.

First, such a meager indication of congressional intent cannot overcome the focused statement of both the House and Senate Committees and principal sponsors of the 1978 amendments to the OCSLA that the Secretary of the Interior had to do no more than consider the views of states through the Section 19 process.

Second, it is conceivable that federal agencies themselves could conduct physical activities associated with lease sales or that others acting on their behalf could do so as part of the leasing stage of an OCS project, which would permit limited state CZMA consistency review. Indeed, prior to the Ninth Circuit's decision in this case, the Department of the Interior did at least once prepare a consistency determination for an OCS sale because the lease stipulations required successful bidders to construct gravel islands immediately beyond the Alaska coastal zone in a fashion that might affect Alaska's land or water uses. (In this case, by contrast, Interior canvassed its pre-leasing activities and determined that none would physically impact the coastal zone. (See p. 8, *supra*)). Even assuming the footnote to the House Report upon which California relied envisioned this type of limited state CZMA consistency review at the leasing

shows,²⁰ gubernatorial recommendations with respect to the "size, timing and location" of leasing are normally accompanied by a state CZMA agency's comments. The Secretary thus has before him when he undertakes the balancing contemplated by Section 19(c) & (d) not only the policy preference expressed by the governor, but also the state's construction of its CZMA program. If that program contains provisions bearing upon the well-being of the citizens of the affected State, the Secretary is obliged to consider any that are brought to his attention in balancing that interest against the national interest.

3. The Exploration Stage—Section 11

Recognizing that States are first "directly affected" by the exploration, production and development stages of the OCS process, 43 U.S.C. § 201(f), the OCSLA does specifically refer to the application of CZMA programs at the exploration stage of an OCS project. It is at this point that OCS activities begin to have even the potential for actual impact upon the marine environment or the coastal zone.²¹ At exploration, lessees are required to file detailed plans with the Department of the Interior describing when, where and how they intend to commence exploratory activities, most notably exploration drilling.

Recognizing the much greater specificity of an OCS project that emerges after tracts have been bid upon and exploration

stage of an OCS project, there is no warrant for assuming that Congress silently harbored the view that States possessed the far broader authority routinely to apply their CZMA programs to challenge the Secretary's selection of OCS tracts for leasing.

²⁰ *E.g.*, Letter of Governor Brown to Secretary Andrus, Dec. 24, 1980 (C.R. 85; A.R. 224w); Letter of Governor Brown to Secretary Andrus, April 7, 1981 (C.R. 85; A.R. 406w).

²¹ *But see* *State of Alaska v. Andrus*, 580 F.2d 465, 486 n.65 (D.C. Cir.), *vacated in part as moot*, 439 U.S. 922 (1978), stressing the limited nature of the environmental impacts associated with exploration.

plans have been filed,²² Congress explicitly provided for state CZMA input into the OCS process at the exploration stage. Thus, Section 11 of the OCSLA, 43 U.S.C. § 1340, governing exploration specifically provides that

"the Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a state with [an approved CZMA program], unless the state concurs . . . with the consistency certification accompanying such plan pursuant to [section 307(c)(3)(B) of the CZMA] . . . or the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) of such act." 43 U.S.C. § 1340(d).

4. The Production Stage—Section 25

Virtually all of the impacts referred to by the lower courts to support their conclusion that OCS leasing directly affects a state's coastal zone—pipeline construction, spills from platforms, migration of labor into the area (72a-73a)—are potential impacts associated with the development/production stage of an OCS project, which does not occur until years after leasing.²³ In many cases, this stage is never reached since exploration fails to discover any commercial quantities of oil or gas in the leasing area; in virtually no case are all portions of an area that is made available for leasing later committed to development and production.

It is at the final production/development stage that the size and location of oil fields are delineated, pipeline or tanker

²² It is not always necessary to explore every OCS tract that has been leased, since exploration activities on adjoining tracts can provide relevant information about those which were unexplored. This is particularly true when initial exploration is unsuccessful. For example, although 63 tracts were acquired in 1979 at OCS Sale No. 42 (North Atlantic) at a cost of more than \$800 million, only eight exploration wells, all dry holes, have been drilled. See *Conservation Law Foundation v. Watt*, 560 F. Supp. at 565-66.

²³ Here, the EIS projected that a 1981 lease sale would lead to development/production no earlier than 1986. EIS at 1-16.

routes for transporting the oil to shore are laid out, on-shore transshipment points are identified, and destination refineries are described. Courts adjudicating prior OCS cases have noted these very facts in excusing the need, at the leasing stage, for speculation under NEPA about pipeline routes and other similar matters. *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1378-79 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978).²⁴

Recognizing both the greater potential of environmental impacts associated with production/development and the greater information available at that stage, Congress in the 1978 amendments to the OCSLA adopted Section 25, 43 U.S.C. § 1351, to provide for review of development/production plans. In an area, such as the Santa Maria Basin, which has had no previous OCS development, the Secretary of the Interior is required to find that approval of at least one development and production plan is a "major federal action" and thus to prepare a new impact statement under NEPA. 43 U.S.C. § 1351(e). He is also required to conduct a public hearing and is directed to "require modification of a plan if he determines that the lessee has failed to make adequate provision in such plan for safe operations on the lease area or for protection of the human, marine, or coastal environment." 43 U.S.C. § 1351(h)(1). The Secretary is explicitly directed to disapprove a plan, if he

²⁴ In that case the Second Circuit held that the requirements of NEPA, which extend to both direct and indirect effects of a proposed major federal action, *see* pp. 36-37, *infra*, did not compel the Secretary of the Interior, at the leasing stage of an OCS project, to address the very issue which the Ninth Circuit held must be considered under the more limited "directly affecting" standard of the CZMA—the exercise by particular state and local jurisdictions of "regulatory powers and procedural requirements that could be invoked to restrict pipelines and landfalls, onshore routing, activities, operations, and effects." 562 F.2d at 1376. The court agreed with the federal defendants and industry intervenors in that case that projecting pipelines and the like at the leasing stage "would amount to a meaningless exercise." 562 F.2d at 1378.

determines that it cannot be modified to permit operations in accordance with statutorily-described factors. 43 U.S.C. § 1351(h)(1)(D).

In the legislative history underlying the 1978 amendments to the OCSLA, Congress described its reasons for adopting Section 25:

"[It] is intended to provide the mechanism for review and evaluation of, and decision on, development and production in a leased area, after consultation and coordination with all affected parties.

"The committee considers this one of the most important provisions of the 1977 amendments. It provides a means to separate the Federal decision to allow private industry to explore for oil and gas from the Federal decision to allow development and production to proceed if the lessee finds oil and gas." H.R. Rep. No. 95-950, 95th Cong., 1st Sess. 164 (1977), *reprinted in* 1978 U.S. Code Cong. & Ad. News 1450, 1570.

Congress went on to describe the reasons for this separation in a fashion that contradicts the Ninth Circuit's position that all of the uncertainties associated with the later stages of an OCS project must be resolved at the leasing stage through CZMA-based litigation:

"The failure to have such a mechanism in the past has led to extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known." *Id.*

As with every other stage of the OCS process, Congress specifically provided for state involvement at the production/development stage. The Secretary of the Interior must submit a lessee's application for approval of a development/production plan to state governors, who have the power to make "recommendations" which the Secretary "shall" accept, unless he finds that the national interest requires otherwise. 43 U.S.C. § 1351(h), § 1345(a)-(d). In terms which echo those of Section 11 as it applies to exploration (*see* p. 28, *supra*), Section 25 also requires the Secretary of the Interior to assure

that the lessee has certified consistency with respect to affected State CZMA programs or otherwise has secured Secretary of Commerce approval for the lessee's activities. 43 U.S.C. § 1351(h)(1)(B).

B. The Lower Courts Erred In Construing The CZMA To Give States A Role In The OCS Leasing Process That They Were Not Provided By The OCSLA.

Another panel of the Ninth Circuit previously held that the OCSLA constitutes a "comprehensive scheme of regulation for the OCS." *California v. Kleppe*, 604 F.2d 1187, 1192 (9th Cir. 1979). Other appellate courts have recognized in a variety of ways the comprehensive responsibilities cast upon the Secretary of the Interior by that statute. See *Massachusetts v. Andrus*, 594 F.2d 872, 892 (1st Cir. 1979) (describing the Secretary's balancing responsibilities in selecting OCS tracts for leasing); *County of Suffolk v. Secretary of the Interior* 562 F.2d at 1378 (recognizing the retained authority of the Secretary to regulate post-leasing stages of the project); *Superior Oil Co. v. Andrus*, 656 F.2d 33, 36 (3d Cir. 1981) (characterizing the OCSLA as "'complete, independent and alone controlling' in the sphere of the [OCS] lands" when addressing the Act's venue provisions); *Village of Kaktovik v. Watt*, 689 F.2d 222, 225-26 (D.C. Cir. 1982) (recognizing the primary purpose of the OCSLA as encouraging the development of our offshore oil and gas resources).

In this comprehensive scheme, Congress made explicit provision for state input into the OCS process at every stage from the five-year leasing schedule to final production and development. At no point in doing so did Congress indicate that it was undoing any element of the 1953 Compromise of the Tidelands Oil Issue. To the contrary, States were limited to "comments" or "recommendations" with respect to Secretary of the Interior's planning or leasing decisions relating to federal disposition of OCS lands, and were permitted to apply their CZMA programs only to lessees exploration and development/production plans when confronted with specific land or water use issues.

Since Congress in the 1978 amendments to the OCSLA painstakingly defined the roles which States were to play in the OCS process, pursuant to its stated purpose of providing them with "an opportunity to participate in policy and planning decisions relating to management of the resources of the [OCS]," 43 U.S.C. § 1802(6), the lower courts erred in interpreting prior, general legislation which makes no reference whatever to OCS leasing in a manner that is inconsistent with the OCSLA. See *NLRB v. Allis-Chalmers Manuf. Co.*, 388 U.S. 175 (1967); *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1957).²⁵

²⁵ The 1978 amendments to the OCSLA contain a general provision that nothing in them "shall be construed to amend, modify, or repeal any provision of the [CZMA], [NEPA], the Mining and Mineral Policy Act of 1970 or any other Act." 43 U.S.C. § 1866(a). The Ninth Circuit referred to this provision of the statute in reaching the conclusion that Section 307(c)(1) of the CZMA could properly be applied to OCS leasing. (20a). This provision, however, is of no significance to the issues presented in this case.

First, petitioners do not urge that the OCSLA of 1978 amended, repealed or modified the CZMA. Our position is that, given the 1953 OCSLA which assigned exclusive jurisdiction to the federal government over OCS leasing and the failure of the 1972 CZMA or its 1976 amendments to in any way modify this congressional determination, there was never any basis for construing the CZMA as extending to the selection of OCS tracts for leasing. The 1978 OCSLA merely carries forward the principles of federal paramountcy over the OCS and provides appropriate means for state input into the OCS process consistent with such federal paramountcy.

Second, the CZMA contains a comparable savings clause which provides that nothing contained within it in any way lessens the federal governments rights under the OCSLA. See p. 39, *infra*.

III. THE CZMA DOES NOT PERMIT STATES TO APPLY THEIR PROGRAMS TO CONTROL THE SECRETARY OF THE INTERIOR'S SELECTION OF OCS TRACTS FOR LEASING.

The specific terms of the CZMA fit precisely with those of the OCSLA in applying the CZMA to the OCS process. Corresponding with the silence of Sections 18 and 19 of the OCSLA as to the application of CZMA programs at the five-year leasing program and leasing stages of the OCS process, Section 307(c)(1) makes no explicit reference to OCS leasing.

Sections 11 and 25 of the OCSLA governing exploration and production/development respectively, find their counterpart in Section 307(c)(3)(B), 16 U.S.C. § 1456(c)(3)(B), of the CZMA. That section of the Act specifically provides that all activities, to the extent they affect land or water uses in a state's coastal zone, which are described in a plan of exploration or development/production filed by an OCS lessee with the Department of the Interior, must be conducted in a manner that is consistent with a state's CZMA program.

Moreover, as we will show, the legislative histories of both Section 307(c)(1) and 307(c)(3)(B) confirm the inference drawn from the face of those statutes that Congress envisioned state CZMA programs would apply to the exploration and development/production stages of an OCS project.

A. The Ninth Circuit's Construction Of Section 307(c)(1) Is Inconsistent With The Plain Meaning Of The Terms Of The CZMA.

Section 307(c)(1) applies only to federal "activities directly affecting" a state's coastal zone. OCS leasing is not such an activity.²⁶

²⁶ Although petitioners did not argue the point in the Ninth Circuit, we did contend in the district court that OCS lease sale decisions are not "activities" within the meaning of Section 307(c)(1). We argued that the term "activity" as used in the CZMA contemplates actual physical activities that could affect the coastal zone—such as the

At the leasing stage of the OCS process, the Department of the Interior itself undertakes no action having any physical impact upon a coastal zone and normally authorizes no actions by lessees which are likely to have any such impacts. As the D.C. Circuit held in *North Slope Borough v. Andrus*, 642 F.2d 589, 593-94 (D.C. Cir. 1980):

"[a]s provided in the [OCSLA], the lease sale itself is only a preliminary and relatively self-contained stage within an overall oil and gas development program which requires substantive approval and review prior to implementation of each of the major stages: leasing, exploring, producing.

". . . Once the Secretary accepts 'high' bids and executes leases, lessees are permitted by federal law, Department

siting, construction, expansion, or operation of equipment or facilities; the actual transportation, conversion, treatment or transfer of oil and gas; the exploration for or development and production of such resources. See 16 U.S.C. §§ 1453(4) & (12) so defining "coastal energy activity" and OCS "energy activity." See also 16 U.S.C. § 1456(c)(3)(A) requiring applicants for a "federal license or permit to conduct an activity affecting land or water uses in the coastal zone" to certify that the proposed activity complies with the state's CZMA program.

We also argued that Sections 307(c)(2) and 307(d), 16 U.S.C. § 1456(c)(2) & (d), which impose consistency requirements upon federal agencies undertaking "any development project in the coastal zone" and upon "[f]ederal agencies . . . approv[ing] proposed projects [pursuant to applications submitted by State and local governments]" would be rendered superfluous, if a mere federal decision, which represent the "first link" in a chain of events ultimately leading to impacts upon the coastal zone, constituted a federal "activity." For every federal development project is preceded by such a federal decision, as is all federal funding of state or local projects.

Since these arguments were not placed before the Court of Appeals, we do not offer them here as an independent basis for reversing its opinion. However, this Court should at least be aware of the prior position we have taken on this issue.

regulations and lease stipulations to engage only in 'preliminary activities.' " (Emphasis and footnote omitted.)

Here, neither the district nor appellate courts found that any environmental impacts were expected during the leasing stage of OCS Sale No. 53 on the California coastal zone. Instead, both courts relied entirely upon the potential environmental impacts of activities conducted later by OCS lessees, principally at the development/production stage of an OCS project, to identify the alleged "direct" effects of OCS leasing. This approach to the statute reads the term "directly" out of the CZMA, since it labels any effect which might arise during the 20-year life of an OCS project as a "direct" effect of leasing itself. This approach to statutory construction has recently been disapproved by this Court.

In *Bowsher v. Merck & Co., Inc.*, ____ U.S. ____, 103 S. Ct. 1587 (1983), this Court construed the phrase "directly pertain to . . . the contract," in determining the authority of the General Accounting Office (GAO) to subpoena documents. The Court soundly rejected GAO's contention that the "directly pertinent" qualification did not impose a limitation upon its authority. The Court held that the insertion of "the word 'directly' before the word 'pertinent' " necessarily was meant as such a limitation. 103 S. Ct. at 1592. It rejected GAO's contrary contention by relying upon the "settled principle of statutory construction that we must give effect, if possible, to every word of the statute," 103 S. Ct. at 1593, citing *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, ____ U.S. ____, 102 S. Ct. 3014, 3022 (1982).²⁷

The Ninth Circuit committed the very error which undermined GAO's position in *Bowsher*, when it adopted a construc-

²⁷ Cf. *E.E.O.C. v. Wyoming*, ____ U.S. ____, 103 S. Ct. 1054, 1062-63 (1983), where this Court found that applying the Age Discrimination Employment Act to States would not "directly impair" their ability to structure their operations, even though the application of that statute to the States might in the future impose additional costs upon them.

tion of Section 307(c)(1) of the CZMA which failed to give any meaning to the term "directly." Had that court adopted any of the conventional definitions of the term acknowledged by the district court (66a-67a)—"simultaneously," "without any intervening agency or instrumentality of a determining influence," "without any intermediate step, without a moment's delay; at once, immediately"—it would have been led to a different construction of Section 307(c)(1). Under any of these definitions, CZMA analysis, at the leasing stage of an OCS project, is not required for exploration or development/production impacts which can only arise at subsequent stages.

The district court and the court of appeals identified the environmental impacts which they described as "direct effects" of OCS leasing by examining the EIS for Sale No. 53 and the SID which was based on that EIS. However, NEPA, the statute which required preparation of the EIS, itself shows the lower court's error. NEPA requires analysis of "major federal actions significantly affecting the . . . environment," 42 U.S.C. § 4332(2)(c), not merely those "directly affecting" the environment. Thus, NEPA regulations require an impact statement to discuss both "direct" and "indirect" effects of a major federal action. 40 C.F.R. § 1502.16 (1980). However, they define those terms in a manner which contradicts the Ninth Circuit:

" 'Effects' include:

"(a) Direct effects, which are caused by the action and occur at the same time and place.

"(b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8.²⁸

Obviously, the exploration and development/production impacts relied upon by the lower courts in applying Section

²⁸ Courts applying NEPA have drawn the same distinction between direct and indirect effects. See *Minnesota Pub. Interest Research Group v. Butz*, 498 F.2d 1314, 1322 (8th Cir. 1974); *North Dakota v. Andrus*, 483 F. Supp. 255, 260 (D. N.D. 1980).

307(c)(1) to OCS leasing are, at best, "indirect effects" of leasing.²⁹

B. The Legislative History Of The CZMA Contradicts The Lower Court's Interpretation Of Section 307(c)(1).

Avoiding the language of the statute—indeed condemning defendants' arguments based upon it as "verbal table thumping" that was a "subterfuge in the present case" producing "an unreasonable result" (67a)—the district court, whose reasoning the court of appeals affirmed on this point (15a-17a), rested its construction of Section 307(c)(1) in substantial measure upon the Act's so-called 1980 legislative history. However, the only the relevant legislative histories, that of the 1972 Congress when Section 307(c)(1) was enacted and of the 1976 Congress when Section 307(c)(3) was amended to refer to OCS operations, squarely contradict the lower courts' interpretation of Section 307(c)(1).

1. Section 307(c)(1)—The 1972 History.

When Section 307(c)(1) was first proposed, it clearly did not apply to OCS leasing decisions. Both the Senate and House bills required Section 307(c)(1) consistency only for "[f]ederal agencies conducting or supporting activities in the coastal zone."³⁰ In confining State CZMA authority to federal activities "in the coastal zone" and defining that phrase as covering essentially the same area as that over which States were given

²⁹ As we discussed above, p. 29 n.24, *infra*, the Second Circuit held that even the broad NEPA requirements for discussing direct and indirect effects of federal actions do not force the Department of the Interior to speculate, at the leasing stage, about the placement of pipelines and other coastal zone impacts which the lower courts here found to be "direct" effects of OCS leasing.

³⁰ S. Rep. No. 753, 92d Cong., 2d Sess. 54 (1972) (Section 314(b)(1) of S. 3507) (emphasis added); H.R. Rep. No. 1049, 92d Cong., 2d Sess. 5 (1972) (Section 307(c)(1) of H.R. 14146) (emphasis added).

mineral leasing authority by the Submerged Lands Act, Congress was acting in accord with principles that had been settled by the 1953 Compromise.

Confirming the inferences to be drawn from this background, debate on the floor of the Congress prior to adoption of these bills clearly revealed a congressional intent not to extend state authority to the federal OCS. For example, in the Senate, it was proposed that States should have CZMA authority to deal with oil pollution which might result from the establishment of deep water ports at "sites outside the 3-mile territorial limit" which would not be "in the coastal zone." 118 Cong. Rec. 14183-84 (1972). Senator Hollings, the sponsor of the CZMA, successfully opposed this amendment in arguing that

"The amendment . . . goes beyond the territorial sea [a reference to three-mile coastal zone] and goes into what we agreed on and compromised on awhile ago. It goes beyond any territorial sea to construction of any facility on the ocean floor, into what we call a contiguous zone from the 3-mile limit to the 12-mile limit." *Id.* at 14184.

Even though both the House and Senate limited Section 307(c)(1) to federal activities "in the coastal zone," other points of difference necessitated a conference. In that conference, the phrase "in the coastal zone" was, without explanation, changed to "directly affecting the coastal zone."³¹ There was no suggestion in the conference report that this change in the statute contemplated state CZMA authority over OCS leasing.

To the contrary, the conference report expressly stated that the bill does not:

"in any way change the states' or Federal interests in resources of the territorial waters or Continental Shelf, as provided for in the Submerged Lands Act and the Outer Continental Shelf Lands Act."³²

³¹ H.R. Conf. Rep. No. 1544, 92d Cong., 2d Sess. 7, 14 (1972) (Section 307(c)(1) of S. 3507).

³² *Id.* at 12.

Indeed, Congress incorporated a specific provision in Section 307 of the 1972 CZMA that

"Nothing in this title shall be construed—

"(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters. . . ." 16 U.S.C. § 1456(e).³¹

Notwithstanding this legislative history, the Ninth Circuit adopted the district court's conclusion that the substitution of "directly affecting" for "in" the coastal zone "expand[ed] the scope of the provision" (53a) so as to allow the States to apply their CZMA programs to OCS leasing decisions. This Court's decision in *North Dakota v. United States*, ___ U.S. ___, 103 S. Ct. 1095, 1103-04 (1983), reveals the lower court's error in so interpreting this unexplained change in Section 307(c)(1).

There, North Dakota relied upon a provision in the Wetlands Act of 1961 requiring gubernatorial consent to the Secretary of the Interior's acquisition of wetlands for migratory bird sanctuaries, in arguing that continuing consent was essential to the acquisition of such lands. In rejecting this argument, the Court stated that

"our conclusion in this regard is strengthened by the fact that, at the time of its enactment, the gubernatorial consent provision was not at all controversial. It was added by the Senate Committee on Commerce without explanation, and was accepted by the House of Representatives without explanation or discussion." *Id.* at 1104 (citations omitted).

³¹ When the conference report was presented to the House and Senate for final approval, the only member of Congress who commented on any issue of relevance here stated that he was "deeply disappointed" that a House proposal, which would have permitted States to extend marine sanctuaries beyond the 3-mile coastal zone to permit state control of federal offshore oil and gas operations, had not been accepted. 118 Cong. Rec. 35549 (1972). Had the conference report accomplished the result now perceived by the lower court, there would have been no occasion for that disappointment.

On this basis, the Court was

"unwilling to assume that Congress, while expressing its firm belief in the need to preserve additional wetlands, so casually would have undercut the United States' ability to plan for their preservation." *Id.*

The same observation applies to the change in Section 307(c)(1) brought about by the unexplained substitution of the phrase "directly affecting the coastal zone" for "in the coastal zone." In the light of the clear delineation of state-federal authority reached by the 1953 Compromise and the steadfast refusal in the debates preceding the 1972 conference report to extend state authority to the OCS, it is simply inconceivable that Congress, in adopting an unexplained amendment to the 1972 CZMA, "so casually would have undercut the United States' ability" to administer the OCS.

2. Section 307(c)(3)—The 1976 History

The 1976 legislative history of the CZMA amendments reinforces the conclusion that should be drawn from the 1972 history. In 1976, Congress focused on the relationship between the CZMA and OCS oil and gas activities and specifically rejected a proposal that the CZMA be applied at the leasing stage of an OCS project.

Some members of Congress considering the 1976 Amendments believed that Section 307(c)(3), as originally written, but not Section 307(c)(1), might apply to the Secretary's leasing decisions. Thus, the Senate report, S. Rep. No. 277, 94th Cong., 1st Sess. 19 (1975), expressed the view that:

"[a]s presently written in the law, this provision [Section 307(c)(3)] gives coastal State governors the opportunity to determine whether the granting of specific Federal licenses or permits would be consistent with State coastal zone management programs. The Committee's intent when the 1972 Act was passed was for the consistency clause to apply to Federal leases for offshore oil and gas development, since such leases were viewed by the Committee to be within the phrase 'licenses or permits.' "

The Senate committee went on to propose the explicit inclusion of the term "lease" within the phrase "license or permit" in Section 307(c)(3). It stated that this confirmation of its reading of Section 307(c)(3) would:

"[i]n practical terms, [mean] . . . that the Secretary of the Interior would need to seek the certification of consistency from adjacent State governors before entering into a binding lease agreement with private oil companies." *Id.* at 20.³⁴

This, of course, is the precise result reached by the lower courts in their construction of Section 307(c)(1).

However, the Senate Committee's approach to Section 307(c)(3) and the proposed amendment to confirm it were resisted by the Administration. As an Assistant Secretary of the Interior explained:

"Our concern is that people may construe this as a requirement that the lease applicant prove Federal consistency before he is physically able to do it. If he does not know what he is going to find out there and has no way of quantifying what he intends to bring ashore, there may be, if this requirement is placed in an amendment to the Coastal Zone Management Act, a legal bar to us issuing a lease."³⁵

Because of these and similar concerns, the amendment that would have added the term "lease" to Section 307(c)(3) was deleted on the House floor to permit further clarification of the matter in conference.³⁶

There, focused attention was given to the question whether OCS leases should be subject to consistency review. It was

³⁴ The House Committee had the same view of the matter. H.R. Rep. No. 878, 94th Cong., 2d Sess. 52-53 (1976).

³⁵ Hearings on Coastal Zone Management Before Subcomm. on Oceanography of House Comm. on Merchant Marine and Fisheries, 94th Cong., 1st Sess. 204 (1975).

³⁶ 122 Cong. Rec. 6128 (1976).

determined that they should not. Instead, Section 307(c)(3)(B) was added to the statute providing for CZMA consistency review only at the later exploration and development production stages of OCS activities. As the conference report explained:

"The conference substitute . . . specifically applies the consistency requirement to the basic steps in the OCS leasing process—namely, the exploration, development and production plans submitted to the Secretary of the Interior."³⁷

Thus, in the 1976 CZMA amendments Congress explicitly addressed the role of the CZMA in the OCS lease issuing process and determined not to make leases subject to CZMA consistency.

3. The 1980 Committee Reports

In the face of the 1972 and 1976 legislative histories, the lower courts relied on so-called 1980 "legislative history," where House and Senate reports suggested a possibly expansive, but unquestionably ambiguous and vague, definition of "directly affecting."³⁸ These reports do not sustain the decision below.

First, as the lower courts conceded, Congress proposed no amendments to Section 307 of the CZMA in 1980, but merely commented upon that section. To call these comments upon a statute that was enacted years earlier "[l]egislative history is a misnomer because, legislative observations ten [or in this case,

³⁷ S. Conf. Rep. No. 987, 94th Cong., 2d Sess. 30 (1976); H.R. Conf. Rep. No. 1298, 94th Cong., 2d Sess. 30 (1976).

³⁸ The "functional interrelationship" and "coastal management consequence" formulations of the standard for applying Section 307(c)(1) referred to by the lower court (17a) are essentially circular. A federal activity has such an "interrelationship" or "management consequence" only if it is within the scope of the statute.

eight] years after passage of the Act are in no sense part of the legislative history." *United Airlines v. McMann*, 434 U.S. 192, 200 n.7 (1977).³⁹

Indeed, it is settled law that post-enactment commentary by even those members of Congress who participated in the enactment of a disputed statute is an unreliable guide to its meaning. See *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980):

"The less formal types of subsequent legislative history [as opposed to subsequent legislation] provide an extremely hazardous basis for inferring the meaning of a Congressional enactment. . . . Such history does not bear a strong indicia of reliability . . . because as time passes memories fade and a person's perception of his earlier intention may change."⁴⁰

Finally, the 1980 House report recognized that in 1972 Congress had not "provide[d] for the problems that states begin to anticipate in connection with increased energy-related activities in the coastal zone" and observed that the 1972 Act gave the States "no part in any decision concerning development on the Outer Continental Shelf. . . ." H.R. Rep. No. 1012, 96 Cong., 2d Sess., 26-27 (1980). To the extent relevant here, this reading of the statute confirms that Congress in 1972 did not undo the 1953 Compromise of the Tidelands Oil Issue.

³⁹ The change in composition in the Senate and House Committees between the 1972 enactment of Section 307(c)(1) and the 1980 reports further diminishes their significance. For example, only 5 of the 17 members serving on the Senate Commerce, Science and Transportation Committee in 1980 had served on that committee in 1972. See [1972] U.S. Code Cong. & Ad. News LXXVII, CIV-CV; [1980] U.S. Code Cong. & Ad. News XCI, CXXVII.

⁴⁰ See also *Bread Political Action Comm. v. FEC*, ___ U.S. ___, 102 S. Ct. 1235, 1237-38 (1982).

Thus, the Ninth Circuit clearly erred in placing "substantial weight" (17a) upon the 1980 committee reports to support its conclusion that Section 307(c)(1) applies to OCS leasing.⁴¹

IV. POLICY CONSIDERATIONS DO NOT SUPPORT THE CONSTRUCTION OF THE CZMA EMBRACED BY THE LOWER COURTS.

The lower courts in large measure based their decision upon the policy argument that a broad construction of the CZMA was necessary to encourage cooperation between the federal and state governments with respect to OCS leasing. We have previously exposed one aspect of the error undermining this assertion, in demonstrating that the 1978 Amendments to the OCSLA specifically provide at every point of the OCS process for state participation and did not contemplate the invocation of state CZMA programs for the selection of OCS tracts for leasing. There is another basic flaw in the policy argument.

This Court noted in *Watt v. Energy Action Education Foundation*, 454 U.S. 151, 154 n.2 (1981), that the "basic purpose" of the 1978 OCSLA amendments was to "promote the swift, orderly and efficient exploitation of our almost untapped domestic oil and gas resources in the Outer Continental Shelf," citing H.R. Rep. No. 95-590, p. 53 (1977). To achieve this end, Congress segmented the OCS process and provided a "pyramidal . . . structure [for the OCS decisional process], proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d at 1297.

⁴¹ See also *Weinberger v. Rossi*, ____ U.S. ____, 102 S. Ct. 1510, 1516 (1982); *County of Washington v. Gunther*, 452 U.S. 161, 176 n.16 (1981); *United States v. Clark*, 445 U.S. 23, 33 n.9 (1980); *Quern v. Mandley*, 436 U.S. 725, 736 n.10 (1978); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132-33 (1974); *United States v. Philadelphia National Bank*, 374 U.S. 321, 348-49 (1963); *United States v. United Mine Workers*, 330 U.S. 258, 281-82 (1947).

As the D.C. Circuit in *North Slope Borough v. Andrus* 642 F.2d at 609, recognized, the OCSLA 1978 amendments were thus designed to require "mandatory stage-by-stage review" so as to "prevent . . . the telescoping of any and every projected hazard to endangered life and the environment into one overwhelming statutory obstacle" that must be confronted at the early stages of a project. Rather than creating such road-blocks at the inception of a project or during its early stages, the OCSLA instead "ensur[es] graduated compliance with environmental and endangered life standards." *Id.*

By so structuring OCS decision-making, Congress removed the necessity of making final tract-deletion decisions at preliminary stages of the OCS process on the basis of environmental issues which could safely be resolved later. In so doing,

"litigation, and especially delay from litigation, were to be discouraged—particularly at the pre-exploration, pre-development leasing stages, where the chances of harm to the environment are slim." *Village of Kaktovik v. Watt*, 689 F.2d at 225-26.

California's assertion of the right under the CZMA, at OCS leasing, to insist upon tract deletions due to possible obstacles that cannot arise until years later at the production/development stage of an OCS project is inconsistent with the congressional scheme underlying the OCSLA.

Moreover, the Ninth Circuit's attempt to preserve federal paramountcy over the OCS through the "maximum extent practicable" qualification of the Secretary of the Interior's purported consistency responsibilities at the leasing stage will, as that court virtually conceded, breed incessant litigation over OCS leasing. This is so because of the vague and general policies set forth in state CZMA programs, which led the very court upon which California relied below in claiming federal sanction for its program, to term the CZMA administrative scheme "wholly unmanageable," "befuddl[ing]," and leading inevitably to "a morass of problems." See pp. 6, 7 & n.4. The selection of OCS tracts for leasing can be extracted from this "morass" by applying the terms of the OCSLA and CZMA as

they were written and as they were interpreted by the members of Congress who enacted them.⁴²

Plainly, it is not good policy—more importantly it defies the policy selected by Congress in the OCSLA—to apply CZMA programs in the manner envisioned by the lower courts. Thus, policy considerations, like the terms of the OCSLA and CZMA and their legislative histories, stand against the Ninth Circuit's construction of the CZMA.

CONCLUSION

For the reasons stated above, the Ninth Circuit's decision that the selection of OCS tracts for leasing is a federal activity "directly affecting" a state's coastal zone should be reversed

⁴² Section 307(c)(3)(B), but not Section 307(c)(1), provides a clear-cut mechanism for federal administrative oversight with respect to the application of CZMA programs to the exploration and production/development stages of OCS projects. In the event that there is a disagreement with respect to consistency at these stages, the Secretary of Commerce may override a state's consistency objections.

and the case should be remanded with directions to enter judgment for all defendants on the CZMA issue.

Respectfully submitted,

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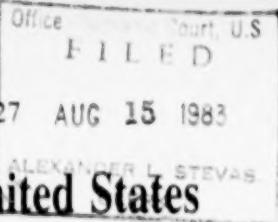
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Nos. 82-1326 and 82-1327
IN THE

Supreme Court of the United States

October Term, 1983

JAMES G. WATT, Secretary of the Interior, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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Question Presented.

Whether the lower courts properly determined that the "directly affecting the coastal zone" test of § 307(c)(1) of the Coastal Zone Management Act is met whenever a federal agency initiates a series of events of coastal management consequence, when that determination is supported by the purposes and legislative history of that provision, and whether, using that test, the lower courts properly determined that Outer Continental Shelf Lease Sale 53 is a federal activity directly affecting the California coastal zone.

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Nos. 82-1326 and 82-1327
IN THE
Supreme Court of the United States

October Term, 1983

JAMES G. WATT, Secretary of the Interior, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

vs.

STATE OF CALIFORNIA, *et al.*,
Respondents.

BRIEF FOR RESPONDENTS.

STATEMENT OF THE CASE.

The dispute in this case, over the meaning of the phrase "directly affecting the coastal zone", the threshold test of § 307(c)(1),¹ and whether it requires a consistency determination for the Department of Interior's ("DOI") offshore pre-leasing and leasing decisions, originated as a disagreement within the federal government. The National Oceanic and Atmospheric Administration ("NOAA"), the agency within the Department of Commerce which is responsible for administering the Coastal Zone Management Act ("CZMA"), repeatedly asserted that the threshold test of

¹16 U.S.C. § 1456(c)(1).

§ 307(c)(1) should be liberally construed, and that DOI's Outer Continental Shelf ("OCS") leasing decisions required a consistency determination under that section.² DOI Pet. at 55a; 44 Fed. Reg. 37146, 37147 (1979). The Department of Interior, on the other hand, desired a restrictive definition of the threshold test, and sought an exemption for its OCS leasing activities.³

The dispute was submitted to the Department of Justice in 1979. The Department of Justice rejected DOI's argument that its leasing activities were exempt from § 307(c)(1), and agreed with the Department of Commerce that such activities were subject to consistency requirements.⁴ Neverthe-

²This Statement of the Case is abbreviated because the facts are fully set out in the District Court Opinion (DOI Pet. at 34a-40a), and in our Brief in Opposition to Petitions for Writ of Certiorari (pp. 1-8).

For the Court's convenience, we note at the outset several forms of citation that will be used throughout Respondent's Brief. The Outer Continental Shelf Lands Act Amendments of 1978 will be called "OCSLA." References to the opinions below are to those opinions as reproduced in the appendices to DOI's Petition for Writ of Certiorari, and will be cited as "DOI Pet. at . . . a." References to Petitioners' briefs will be "DOI Br. p. . . ." and "WOGA (Western Oil and Gas Association, *et al.*) Br. p. . . ."

The brief of respondents County of Humboldt *et al.* will be referred to as "Local Gov't Br. at . . .". The brief of respondents Natural Resources Defense Council *et al.* will be referred to as "NRDC Br. at . . .".

³Even prior to this specific dispute, there was disagreement over which agency should administer the CZMA. Although DOI actively sought GZMA administration, Congress gave it to the Department of Commerce and NOAA, based on that agency's superior expertise in coastal zone matters. See S. Rep. No. 92-526, 92nd Cong., 1st Sess. 42, 49 (1972).

⁴Letter, April 20, 1979, from Leon Ulman, Office of Legal Counsel, Department of Justice, to C. L. Haslam, General Counsel, Department of Commerce, and Leo M. Krulitz, Solicitor, Department of Interior (hereafter "DOJ Opinion"), J.A. 35, 36. The opinions of the Departments of Justice and Commerce notwithstanding, Interior refused to issue a consistency determination for the final notice of sale for Lease Sale 48 offshore Southern California. 44 Fed. Reg. 44590 (1979). California requested mediation by the Secretary of Commerce, as provided for in the CZMA, in order to resolve for future lease sales (particularly Sale 53) the question of the applicability of § 307(c)(1) at the leasing stage. See 16 U.S.C. § 1456(h); 15 C.F.R. 930 subpart (G).

less, DOI refused to prepare a consistency determination for Lease Sale 53. J.A. 66, 133. This refusal to conduct a consistency determination set the stage for the instant lawsuit, because California objected to the leasing of certain tracts on the basis of Interior's failure to comply with the CZMA's consistency requirements.⁵

California has always supported energy development where the benefits outweighed the risks. Although DOI's failure to issue a consistency determination invalidated the entire lease sale,⁶ the state sought to limit its claims to only the most critical tracts in order to avoid impeding energy production. As a result, California sought an injunction on the basis of DOI's violation of the CZMA as to only 29 tracts in the sale.⁷ These 29 tracts are extremely close to

While the mediation was unsuccessful in producing any compromise, the mediator (the General Counsel of the Department of Commerce) concurred in California's view, calling the determination of the specific location in which to offer OCS leases "the key activity that creates a right to develop those leases," and noting that consistency review at the subsequent exploration and development stages "will address specific and individual exploration and development plans and will provide only a piecemeal review of the leasing activities." Memorandum, July 25, 1980 for the Secretary from, C. L. Haslam, General Counsel, Department of Commerce "Mediation of a Serious Disagreement between State of California and Department of Interior," attached to H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 82 reprinted in [1980] U.S. Code Cong. & Ad. News 7885, 7886 (hereafter referred to as "Mediator's Report"). He concluded that pre-lease activities are subject to the consistency provisions of § 307(c)(1). *Id.* at 82.

⁵California did not seek a premature determination of inconsistency but sought only an order directing DOI to fulfill its consistency obligations under § 307(c)(1), *i.e.*, that DOI must issue a consistency determination. 15 C.F.R. § 930.37.

⁶As originally envisioned by Interior Secretary Watt, Lease Sale 53 included the entire coast of Central and Northern California from Santa Barbara County to the Oregon border. DOI Pet. at 37a-38a. Secretary Watt subsequently divided the area into two lease sales, and Lease Sale 53 was limited to 111 tracts off the Central California coast. *Id.* A typical OCS tract is 5,760 acres. 43 U.S.C. 1337(b)(1).

⁷These tracts contain only about 8% of the oil reserves projected for the sale area according to Interior's subagency, the United States Geological Survey. Letter, May 1, 1981 to Governor Edmund Brown from James Watt, Secretary of the Interior, J.A. 144 (A.R. 461W).

(footnote continued on following page)

shore and are immediately adjacent to the coastal zone. Twenty-four of the tracts are within 12 miles of the coast, and all of the tracts range seaward from 3 to 24 miles offshore. DOI Pet. at 39a.

The District Court found that California had demonstrated a probability of success on the merits of this claim and preliminarily enjoined the challenged portion of the lease sale. On cross-motions for summary judgment, the District Court held that Lease Sale 53 directly affected the coastal zone and must be the subject of a consistency determination, and made permanent its injunction against the leasing of the disputed tracts.

On appeal, the Ninth Circuit affirmed the District Court's ruling on § 307(c)(1). The Court of Appeals followed much the same course of reasoning as the District Court, analyzing the purpose of the CZMA, its legislative history, and

California also sought to enjoin leasing of the disputed CZMA tracts (plus three additional tracts) because of the Secretary of the Interior's rejection of the California governor's recommendations, under § 19 of the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1345. The courts below ruled against respondents on this claim.

Despite the attempts of Interior and WOGA to portray the protection of the sea otter as California's sole concern with the disputed tracts, the State's concerns included the negative effects on many valuable biological resources, fisheries, ocean vessel traffic, port access, and coastal tourism and recreation. See, Letter, December 24, 1980, to Cecil Andrus, Secretary of the Interior, from Edmund G. Brown, Governor of the State of California, J.A. 89-95 (A.R. 224W).

Petitioners base this and other arguments on the Coastal Commission's Recommendation on Lease Sale 53 (J.A. 109). The main purpose of this document was to demonstrate that the Commission had serious concerns about the tracts at issue, and to show that a consistency determination was not academic.

DOI relies on this document to create the impression that California has already made the consistency determination. Fed. Br. pp. 46-47. However, as we will explain, it is DOI, not the state, that issues the consistency determination. The state then has the opportunity to disagree, and if so, the state and federal government are to try to resolve their differences. See Part IV, *infra*.

That process has never been followed in this case because of DOI's refusal to issue a consistency determination. Accordingly, all of WOGA's arguments concerning how the policies of the California Coastal Zone Management Program should or should not be applied (WOGA Br. pp. 8, 45) are simply not ripe for review, since those policies have never been applied by DOI in this case. See: Brief for the Cross-Petitioners pp. 10-22.

NOAA's longstanding position on the meaning of "directly affecting." It concluded that the lease sale was a federal activity directly affecting the coastal zone because "decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production." DOI Pet. at 13a.

The other courts that have reviewed this issue have also held that DOI's OCS leasing decision requires a consistency determination under § 307(c)(1) of the CZMA. *California v. Watt*, 17 E.R.C. 1711 (C.D. Cal. June 9, 1982); *Kean v. Watt*, No. 82-2420 (D.N.J. September 7, 1982), appeals pending No. 82-5679. As a result of the ruling in this case, DOI has now prepared consistency determinations for OCS lease sales for states throughout the country, including: Alaska, New Jersey, Massachusetts, Maine, New Hampshire, Rhode Island, Connecticut, New York, Maryland, Delaware, North Carolina, South Carolina, Florida, and, most recently, California.

SUMMARY OF ARGUMENT

Petitioners, DOI and WOGA, have sought to portray this as a case arising under the Outer Continental Shelf Lands Act. The majority of their briefing is devoted to the terms of that statute, and the authority OCSLA assigns to DOI. In their zeal to explore this topic, petitioners have largely overlooked the fact that this case arises under a different statute, § 307(c)(1) of the Coastal Zone Management Act. That section provides as follows:

"Each Federal agency conducting or supporting activities *directly affecting the coastal zone* shall conduct or support those activities in a manner which is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(1) (emphasis added).

At the outset, it is important to bear in mind that the CZMA establishes a system of federal-state coordination and cooperation for the long-term management and protection of the coastal zone. DOI's OCS activities are only one

narrow group of federal activities which must fulfill the requirements of this Act. To view this as an OCSLA case, as petitioners suggest, would result in a skewed definition of the phrase "directly affecting the coastal zone," as used in the CZMA, and would seriously frustrate Congressional intent to have federal agencies ensure that their activities which impact the coastal zone are consistent with a national scheme for coastal zone management.

The question before this Court is: what did Congress intend by the phrase "directly affecting the coastal zone," the threshold test of § 307(c)(1) of the CZMA, and how was this test intended to apply in the context of oil and gas activities on the OCS. As to the "directly affecting" language, petitioners would have this Court resolve the meaning of this phrase by relying solely on the "plain meaning rule." However, petitioners' reliance on this rule is misplaced because the definition they offer is one of their own making. Their requirement of "physical impacts" on the coastal zone "prior to further federal approval" is nowhere to be found in the dictionary they cite.

The lower courts properly rejected petitioners' approach and attempted instead to determine congressional intent based upon all of the traditional sources: the language of the Act, its purposes and policies, the legislative history, and the interpretation of the agency charged with administering the Act. After detailed review, the lower courts properly determined that Congress intended the threshold test was met whenever a federal agency initiates "a series of events of coastal management consequence." DOI Pet. at 15a, 50a. Petitioner's definition is inconsistent with congressional statements about the meaning of the "directly affecting" test, and frustrates the purposes of the CZMA.

As to the question of how § 307(c)(1) should apply in the context of OCS oil and gas activities, the lower courts correctly found that Congress intended that CZMA requirements would apply to DOI's OCS pre-leasing and leasing

activities. DOI Pet. at 12a-13a, 51a. These congressional statements appear not only in the legislative history of the CZMA, but also in the legislative history of OCSLA, the very statute upon which petitioners rely to exempt federal OCS activities. Congress made clear that both OCSLA and the CZMA were intended to apply to DOI's activities at the lease sale stage.

Nor will the implementation of this clear congressional intent amount to a state usurpation of activities under federal jurisdiction. It is the *federally-approved* coastal zone management *program* with which the federal agency activities must be consistent. Respondents seek only the rights Congress has granted the states in order to implement the national interest in preserving and protecting the coastal zone. As NOAA concluded in 1979, "[f]ailure to apply 307(c)(1) to Interior's OCS activities would constitute the *only* exemption to the federal consistency requirements of the CZMA, thus establishing a seriously harmful precedent for other federal activities. . . ." J.A. 61 (emphasis added)

ARGUMENT.

I.

CONGRESS INTENDED AN EXPANSIVE CONSTRUCTION OF THE PHRASE "DIRECTLY AFFECTING THE COASTAL ZONE," WHICH IS MET WHENEVER A FEDERAL AGENCY INITIATES A SERIES OF EVENTS OF COASTAL ZONE MANAGEMENT CONSEQUENCE.

As the lower courts properly concluded, effectuating congressional intent should be the primary concern of the court in construing the meaning of disputed language. DOI Pet. at 41a. To construe and interpret § 307(c)(1), the lower courts properly considered the language of the statute, its purposes, the legislative history and the interpretation of the agency charged with administering the Act. DOI Pet. at 13a-18a, 41a.

A. Only a Broad Construction of the "Directly Affecting" Threshold Test Can Fulfill Congressional Purposes in Adopting the CZMA.

Effectuating the purpose of a statute is critical to the interpretation of disputed language. *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975). The CZMA had its roots in the congressional determination, after several years of study, that legislation was necessary to protect, preserve and restore the nation's coastal zone. H.R. Rep. No. 92-1049, 92nd Cong., 2d Sess. 9-11 (1972). Congress determined that the coastal zone is "the Nation's *most valuable* geographic asset." *Id.* at 9 (emphasis added).

However, the coastal zone was (and still is) threatened with rapid deterioration and irreparable damage based upon accelerating development, including the extraction of mineral resources and fossil fuels. H.R. Rep. No. 92-1049, *supra* at 1, 9; see also 16 U.S.C. §§ 1451(c),⁸ (d), (e), (f), (g). As a result, Congress adopted the CZMA in order to "establish a national policy and develop a national program" for the long-term protection of valuable coastal zone resources.⁹ H.R. Rep. No. 92-1049, *supra* at 1; S. Rep. No. 92-753, 92nd Cong., 2d Sess. 1 (1972); 16 U.S.C. §§ 1451(a), (b), (d), (e), 1452(1), (2).

In construing § 307(c)(1), it is essential to bear in mind that in order to protect the coastal zone, Congress selected a particular system of federal-state coordination and cooperative planning. See, e.g., S.Rep. No. 94-277, 94th Cong., 1st Sess. 3 (1975). Thus, while the national coastal zone management program was to be developed by individual states, it was to be approved by the federal government, and it was to be administered through federal-state coordination. See, e.g., 16 U.S.C. §§ 1451(i), 1452(2), (4);

⁸The reference in § 1451(c) to extraction of mineral resources and fossil fuels was apparently intended to include a reference to OCS development, as indicated by the 1980 addition of § 1451(f). (Coastal Zone Management Improvement Act of 1980, Pub. L. No. 96-464, 94 Stat. 2060).

⁹These coastal zone resources may include, for example, fisheries, beaches, estuaries, wetlands, etc. 16 U.S.C. § 1453(2).

1456(b), (c); 1455(c)(1), (8). Federal agencies engaged in programs "affecting the coastal zone" were encouraged to cooperate and participate in this scheme. 16 U.S.C. § 1452(4).

Because state participation in this federal scheme was voluntary, Congress established certain incentives for the states. One was the promise of financial assistance to states in developing these coastal zone management programs. However, the most important incentive was the promise that once the federal government had approved the management program, that program would not be violated by the activities and development projects of individual federal agencies.¹⁰ §§ 307(c)(1), 307(c)(2).¹¹ This promise, as articulated in § 307(c), is at the heart of the inter-governmental coordination provisions of the CZMA. See, e.g., H.R. Rep. No. 96-1012, *supra* n. 10, at 34.

This view of the statute was recently confirmed by virtue of Congressional amendments to the CZMA in 1980. In explaining its amendments to the policy section of the Act (16 U.S.C. § 1452), Congress stated:

"... an *expansive interpretation of the threshold test* [of § 307(c)(1)] is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in: carrying out the purposes of the act." H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 35 (1980) (emphasis added).¹²

¹⁰DOI Pet. at 43a; see, e.g., H.R. Rep. No. 96-1012, 96th Cong., 2d Sess. 35 (1980) ("... broad opportunities for states to influence Federal activities enhances the incentive of the consistency provisions, thereby reinforcing voluntary state participation in the national program); see also H.R. Rep. No. 94-878, 94th Cong., 2d Sess. 53 (1976).

¹¹In addition to § 307(c)(1), § 307(c)(2) mandates consistency for federal development projects within the coastal zone as follows: "Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with approved state management programs." 16 U.S.C. § 1456(c)(2) (emphasis added).

¹²Similarly, NOAA, the agency charged with administering the statute, has recognized that a determination that a federal activity directly affects the coastal zone has significant benefits. As a result, "... Federal agencies are encouraged to construe *liberally* the 'directly affecting' test in borderline cases so as to favor inclusion of Federal activities subject to consistency review." See 44 Fed. Reg. 37146, 37147 (1979) (emphasis added), see also J.A. 59-62.

In short, as the lower courts correctly concluded, the CZMA was intended to establish a national program for the long-term management and preservation of the coastal zone, and Congress chose to implement this program through a scheme of federal-state cooperation and coordination. Accordingly, the purposes of the statute would not be served by a narrow, restrictive construction of the "directly affecting" threshold test,¹³ as DOI has proposed. To the contrary, such an approach to the statute would have the effect of eliminating federal-state coordination under the CZMA while at the same time immunizing federal programs from consistency review despite their adverse impacts on the coastal zone. See DOI Pet. at 45a. This approach would inevitably lead to further degradation of the coastal zone by the very agencies restricted by the statute, contrary to the result Congress sought to achieve.¹⁴

B. Congress Intended That the "Directly Affecting" Threshold Test Is Met When a Federal Agency Initiates a Series of Events of Coastal Management Consequence.

1. The Legislative History of the CZMA Contains Clear Guidance as to the Meaning of the Threshold Test.

In construing the phrase "directly affecting the coastal zone," it is important to bear in mind that this threshold test applies to a broad variety of federal agency activities and programs, and is not just limited to DOI's activities — let alone to DOI's OCS activities. Petitioners' narrow definition of the phrase (*i.e.*, that the federal activity must have a physical impact upon the coastal zone prior to further federal approvals) would not only thwart the purposes and

¹³Although we will at times use a shorthand statement such as the "directly affecting" test, it is important to bear in mind that it is an entire phrase ("directly affecting the coastal zone") that must be construed.

¹⁴See, *e.g.*, S. Rep. No. 92-753, *supra*, at 19 ("... the Committee deems it *essential* that Federal agencies administer their programs, including developmental projects, consistent with the state's coastal zone management program.") (emphasis added); see also S. Rep. No. 94-277, 94th Cong., 1st Sess. 36 (1975).

policies of the Act, but also is clearly at odds with congressional statements in the legislative history of the CZMA. The CZMA was adopted in 1972 and amended in 1976 and 1980.

The original House and Senate versions of § 307(c)(1) applied only to federal activities and development projects *in the coastal zone*. S. Rep. No. 92-753, 92nd Cong., 2d Sess. 54 (1972); H.R. Rep. No. 92-1049, 92d Cong., 2d Sess. 5 (1972). The Senate version of the Act made clear that federal lands were excluded from the definition of "coastal zone." S. Rep. No. 92-753, 92nd Cong., 2d Sess. 47 (1972).

However, in Conference, § 307(c)(1) was changed so that it was no longer restricted to federal activities within the coastal zone. Instead, federal activities outside the coastal zone would also be covered if they met the "directly affecting" threshold test.¹⁵ The conferees agreed that:

"... as to Federal agencies involved in any activities *directly affecting the state coastal zone* and any Federal participation in development projects *in the coastal zone*, the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management plans." H.R. Conf. Rep. No. 92-1544, 92nd Cong., 2d Sess. 14 *reprinted in* [1972], U.S. Code Cong. & Ad. News 4822, 4824 (emphasis added).

At the same time, the conferees selected the definition of coastal zone that made clear that federal lands — including OCS lands — are outside the coastal zone. Nevertheless, "[a]s to the *use of such lands* [i.e. federal lands, including OCS lands] which would affect a state's coastal zone, the *provisions of section 307(c) would apply*."¹⁶ H.R. Conf. Rep. No. 92-1544, *supra* at 12. This statement is more easily understood in light of earlier legislative history.

¹⁵Section 307(c)(2) continued to apply only to federal development projects within the coastal zone. 16 U.S.C. § 1456(c)(2).

¹⁶Since § 307(c)(2) applies to federal development projects in the coastal zone, this statement was clearly a reference to § 307(c)(1).

In trying to understand the meaning of the "directly affecting" test, it is important to realize that Congress always expected federal lands to comply with consistency requirements when they had a "functional interrelationship" with the coastal zone. Indeed, this was the case even in early versions of the statute which applied consistency requirements only "in" the coastal zone. Congress indicated that it intended OCS lands and other

"lands or waters under Federal jurisdiction and control, within or adjacent to the coastal and estuarine zone, where the administering Federal agency determines them to have a *functional interrelationship* from an economic, social or geographic standpoint with lands and waters within the coastal and estuarine zone, *should be administered consistent* with approved State management programs." See S. Rep. No. 92-526, 92nd Cong., 1st Sess. 20, 30 (1971) (emphasis added).

The Conference Report change to the "directly affecting the coastal zone" test made clear that these federal lands (including OCS lands) were covered by consistency under § 307(c)(1) even though such lands were outside the coastal zone.¹⁷

¹⁷Incredibly, DOI asserts that the § 307(c)(1) change from "in the coastal zone" to "directly affecting the coastal zone" had a "limiting function", i.e., to "identify those activities on federal lands *within* the confines of a state's coastal zone that would be subject to the consistency requirements of the Act while at the same time excluding other activities from such requirements." Fed. Br. p. 24 (emphasis added). This argument makes no sense for two reasons.

First, Congress' adoption of a definition clearly excluding federal lands from the "coastal zone" had already clarified this point. 16 U.S.C. § 1453(1). Thus, § 307(c)(2) as codified refers to federal development projects *in* the coastal zone without suffering from the ambiguity petitioners suggest. 16 U.S.C. § 1456(c)(2).

Second, this argument suggests that § 307(c)(1) addresses only federal activities on federal lands *within* the three mile limit. However, NOAA's regulations make clear that federal lands outside the coastal zone limits, including OCS lands, are encompassed by consistency requirements. 44 Fed. Reg. 37142, 37146 (1979). Similarly, the 1975

In 1976, Congress amended the CZMA further, but left § 307(c)(1) unchanged, and provided no additional insight as to the meaning of "directly affecting."¹⁸ However, in 1980, Congress undertook a comprehensive evaluation of the CZMA. Despite oil company lobbying to alter § 307,¹⁹ it decided to leave the consistency requirements intact. However, in light of the dispute that had arisen over the meaning of the § 307(c)(1) threshold test,²⁰ and because of industry requests for an amendment, both the House and the Senate discussed the meaning of the "directly affecting" test, and how it applies in the context of an OCS lease sale. H.R. Rep. No. 96-1012, *supra* at 34, 35; S. Rep. No. 96-783, 96th Cong., 2d Sess. 10-11 (1980).

The Committee reports pointed out that Congress had considered the phrase "directly affecting the coastal zone" during earlier Congressional deliberations, and found that this threshold test was met whenever a federal activity

Senate Report makes clear that § 307(c)(1) includes "... activities in or out of the coastal zone which affect that area." S. Rep. No. 94-277, *supra* at 36-37 (emphasis added). DOI's argument was properly rejected by the lower courts, which concluded, like NOAA, that the change to "directly affecting" was an expansion, not a contraction. NOAA, "Issue Paper, Section 307(c)(1) — Defining the Term 'Directly Affecting' Found in Section 307(c)(1) of the Coastal Zone Management Act" (1981) at 5, Fed. Exh. L-1EE, C.R. 38. (Hereafter "NOAA Issue Paper").

Petitioners' argument does, however, make clear that they seek to read the "directly affecting" test out of the statute, and to rewrite § 307(c)(1) to again read "in the coastal zone."

¹⁸In 1976 Congress did amend another section, § 307(c)(3). This subsection applies to *applicants* for federal licenses and permits, but does not apply to the federal government. DOI has improperly relied on this change in a vain attempt to restrict its obligations under § 307(c)(1). See Part II, *infra*.

¹⁹See Testimony of Charles H. Barre on behalf of the American Petroleum Institute and Western Oil and Gas Association, in hearings before the Committee on Commerce, Science, and Transportation on S. 2622, to improve Coastal Zone Management and for other purposes (April 30, 1980) at 82, 85, 86.

²⁰Congress was aware of the California-DOI dispute that went to mediation before NOAA in 1979. See Statement of the Case, *supra*. The Mediator's Report is cited in the 1980 legislative history and attached thereto. H.R. Rep. No. 96-1012, *supra* at 34, 82.

"... had a *functional interrelationship* from an economic, geographic or social standpoint with a state coastal program's land or water use policies." H.R. Rep. No. 96-1012, *supra* at 34, (emphasis added). This is, of course, the same "functional interrelationship" test drawn from 1971, when Congress was drafting the Act.

The House Report indicated that this "functional interrelationship" test could be restated as follows:

"Thus, when a Federal agency initiates a *series of events of coastal management consequence*, the inter-governmental coordination provisions of the Federal consistency requirements should apply." H.R. Rep. No. 96-1012, *supra* at 34; S. Rep. No. 96-783, *supra* at 11 (emphasis added).

Accordingly, it is important to recognize that the meaning of "directly affecting the coastal zone" advanced by California, and effectively adopted by the lower courts²¹ (*i.e.*, the functional interrelationship test as recently restated by Congress) is taken straight from the Congressional history of the CZMA.²²

2. The Lower Courts Properly Determined That the Legislative History of the 1980 CZMA Amendments Must Be Considered and Given Significant Weight.

The legislative history of the 1980 CZMA amendments was given substantial weight by the lower courts because it contains the latest expression of congressional intent as to the meaning of § 307(c)(1), including significant statements regarding the very issue before this Court, *i.e.*, what is the meaning of the phrase "directly affecting the coastal zone," and how should it be applied within the context of federal OCS leasing activities.²³ DOI Pet. at 15a-16a; 50a-51a.

²¹DOI Pet. 12a-13a, 51a.

²²On the other hand, the definition offered by DOI and WOGA has no basis in the legislative history, and would thwart the purposes and policies of the Act. (See Part I-C, *infra*.)

²³The OCS portion of the 1980 legislative history is addressed, *infra*, in Part II.

Nevertheless, DOI and WOGA urge that the reports be disregarded as "subsequent legislative history." In effect, they are asking the Court to accept their view of the statute and to ignore express statements of congressional intent. Their position is without merit.

First, the 1980 legislative history simply restates the test found in legislative history which dates back to 1971. The 1971 Senate Report states that consistency requirements apply to waters under federal jurisdiction, although outside the coastal zone, if they have a "functional interrelationship from an economic, social or geographic standpoint with lands and waters within the coastal zone." S. Rep. No. 92-526, 92nd Cong., 1st Sess. 30 (1971).²⁴ Because of its awareness of the dispute over the meaning of § 307(c)(1),²⁵ Congress in 1980 simply reiterated this "functional interrelationship test," while also providing an alternative method of phrasing the same test, *i.e.*, set in motion a series of events of coastal management consequence. In so doing, Congress did not alter the threshold test of § 307(c)(1), but merely confirmed it. H.R. Rep. No. 96-1012, *supra*, at 39.²⁶

²⁴It must be remembered that Interior's Solicitor conceded that this is the one piece of early legislative history that explains the intent of Congress concerning what federal activities should be subject to § 307(c)(1) consistency. See Oct. 10, 1979, Memorandum to the Secretary of the Interior from Solicitor, "Consistency of Outer Continental Shelf (OCS) Pre-lease Activities with Coastal Management Programs," at 4-5, Exh. L-BB, C.R. 38. The preamble to NOAA's regulations also recognizes that early legislative history applied the functional interrelationship test. 44 Fed. Reg. 37143 (1979).

²⁵See H.R. Rep. No. 96-1012, *supra*, at 34, 82.

²⁶As recently as 1981, NOAA pointed to this 1980 legislative history to demonstrate that Congress had restated its original intent regarding the "functional interrelationship" test, and had "further clarified the definition of 'directly affecting' by noting that the term was to be confined to instances where Federal agencies initiated a series of events which are linked to resource management consequences in the coastal zone." NOAA Issue Paper at 9.

NOAA also correctly pointed out that on the House floor Congressman Studds, Chairman of the Subcommittee on Oceanography and the principal architect of the 1980 amendments, emphasized that the House Report language was intended to clarify but not modify the meaning of the term "directly affecting." NOAA Issue Paper pp. 9-10. See also 126 Cong. Rec. H 10111-H 10112 (daily ed. September 30, 1980).

Second, in 1980 the House and Senate conducted a comprehensive examination of the CZMA. The 1980 amendments to the CZMA were entitled: "The Coastal Zone Management *Improvement* Act of 1980", Pub. L. No. 94-464, 94 Stat. 2060 (emphasis added). In specifying the purpose of the legislation, the House Report states:

"The *primary purpose* of H.R. 6979 is to *reaffirm* the nation's commitment to the wise use and management of our coastal resources *through the coastal zone management program*.

"In this, the Presidentially endorsed 'Year of the Coast,' the committee believes that the *reauthorization* and *strengthening* of the Coastal Zone Management Act of 1972 is both necessary and appropriate. . . .

"The committee also believes that the amendments provided in H.R. 6979 will refocus the CZMA from the program development phase *to the implementation and enforcement phase* of state management efforts."

H.R. Rep. No. 96-1012, *supra*, at 14-15; see also S. Rep. No. 96-783, *supra*, at 2-3 (emphasis added).

Pursuant to its oversight authority, the House Subcommittee on Oceanography of the Merchant Marine and Fisheries Committee expended a year's effort²⁷ in a comprehensive review to determine what changes were needed in the Act for the implementation phase,²⁸ and what sections, such as 307(c)(1), should remain unchanged. H.R. Rep. No. 96-1012, *supra*, at 30; see also S. Rep. No. 96-783, *supra*, at 2; 126 Cong. Rec. H10108 (daily ed. September 30, 1980).

Following this extensive analysis, the committees with Congressional oversight authority for the CZMA explained why § 307(c)(1) should *not* be amended or changed during

²⁷There were eleven hearings in the House alone. 126 Cong. Rec. H10108 (daily ed. Sept. 30, 1980).

²⁸Obviously, there were no management programs in effect in 1972. As of 1980, nineteen states and territories had approved coastal management programs. S. Rep. No. 96-783, *supra*, at 2. Accordingly, in 1980 Congress focused its attention on the implementation of coastal management programs, as opposed to their development.

the implementation phase despite oil company requests. Although many other sections of the Act were changed, the committees stressed the importance of continuing consistency requirements for federal activities which directly affect the coastal zone, specifically including DOI's OCS activities. The 1980 decision not to amend § 307(c)(1) was based on congressional understanding of what the "directly affecting" test meant, and how it applied to federal OCS activities, as these matters were explained in the 1980 legislative history. Only by giving weight to this legislative history can Congress' decision to leave this section of the Act untouched be understood.

Thus, the 1980 reports constitute the most recent legislative history for the CZMA, as it now stands. These reports should receive at least the same weight as given to the 1972 and 1976 reports.²⁹ This is especially the case because Con-

²⁹In claiming that the 1980 reports are the subsequent legislative history of committees, petitioners forget that they are relying in large measure on committee reports from 1976 and even 1978 (under a different statute, OCSLA), clearly subsequent to the enactment of the CZMA. Moreover, while the 1980 committee reports address the very section at issue here, § 307(c)(1) of the CZMA, the material cited by petitioners addresses either a different section of the CZMA or a different statute altogether.

Petitioners also argue that the 1980 committee reports were not voted upon by the entire Congress. DOI Br. p. 40. However, that is always the case with committee reports. As in the usual situation, it must be presumed that Congress had knowledge of the reports prepared by the committees with the expertise. The full Congress did vote on the 1980 amendments following committee oversight; if Congress were dissatisfied with § 307, there would presumably have been an attempt to amend it on the floor.

In any event, the debates indicate congressional awareness of the content of the 1980 committee report. 126 Cong. Rec. H10111-H10112 (daily ed. Sept. 30, 1980). Moreover, the Chairman of the House Subcommittee stressed, as had the committee reports, that nothing in the reports changed the meaning of "directly affecting." *Id.* Instead, the reports simply reflected Congress' longstanding understanding of the meaning of the term.

Thus, DOI's argument that these reports represent only the "personal view" of legislators (DOI Br. p. 40) is clearly incorrect. Moreover, petitioners have cited authority which is completely inapposite (for example where individual legislators inserted their views in the Congressional Record after passage of the act in question, or where the committee making the statement had no jurisdiction over the statute at issue). DOI Br. pp. 40-41.

gress in 1980 sought to focus the CZMA toward the implementation and enforcement of coastal zone management programs. The consistency requirements of § 307(c)(1) are obviously central to this implementation effort. In the absence of federal agency consistency, the ability of the coastal states to manage the coastal zone effectively and comprehensively would be completely undercut.

DOI and WOGA claim otherwise because Congress did not amend § 307 in 1980. Notwithstanding the absence of an amendment to the particular section of the act at issue, this Court has frequently relied on recent legislative history (including committee reports) because it demonstrated Congress' understanding that the issue before the Court had already been resolved. See, e.g., *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980); *Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 595-596 (1980); *Bell v. New Jersey*, — U.S. —, 103 S.Ct. 2187, 2194 (1983). Similarly, in this case, the 1980 legislative history explains Congress' view that the "directly affecting" threshold test had always been equated with the 1971 "functional interrelationship" language, and that this language had always encompassed federal OCS leasing activities. Moreover, the Court has been specifically receptive to committee reports which, as in this case, are a product of congressional scrutiny of a statute pursuant to the committees' oversight function. *Administrator, Federal Aviation Admin. v. Robertson*, 422 U.S. 255, 266 (1975).

In addition, Congress did adopt amendments in 1980 which relate to the issue before this Court. For example, Congress amended the policy section of the act having to do with cooperation of federal agencies. Pub. L. No. 96-464, § 303, 94 Stat. 2060, *supra*. The committee explained this change in the very section of the legislative history which discusses federal consistency under § 307(c)(1). H.R. Rep. No. 96-1012, *supra*, at 35.³⁰ In this respect, the 1980

³⁰The language in the House amendment to § 303(3) was enacted. H.R. Rep. No. 96-1012, *supra*, at 2; 16 U.S.C. § 1452(3).

legislative history can be viewed as contemporaneous.³¹

Even assuming, however, that the 1980 reports constituted subsequent legislative history, they should still be given significant weight in the search for legislative intent because they are clearly relevant. *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. *supra*, at 596 (particularly when the precise intent of the enacting Congress is obscure); *Andrus v. Shell Oil Co.*, *supra*, 446 U.S. at 665-666, n. 8; *Bell v. New Jersey*, *supra*, 103 S.Ct. at 2194.

C. DOI's Interpretation of the Phrase "Directly Affecting the Coastal Zone" Is Not the "Plain Meaning" of the Phrase and Frustrates Congressional Intent.

As restated in DOI's brief, the "directly affecting the coastal zone" test is met only when the federal agency authorizes activities that ". . . prior to *further federal* approval and *review*, will have a *physical impact* upon [the coastal] zone." DOI Br. p. 21³² (emphasis added). DOI contends that the lower courts erred in rejecting this definition because it represents the "plain meaning" of the words "directly affecting the coastal zone." DOI's argument must fail for several reasons.

The most obvious defect is that DOI's definition is not the "plain meaning" of the phrase at issue. Although DOI claims its definition represents the common understanding of the word "directly," this definition cannot be found in

³¹Congress also adopted a 1980 finding which expressly included OCS activities among the activities which require coastal zone management. Pub. L. No. 96-964 § 302(f), *supra* n. 8. As discussed, *infra* p. 28, a good portion of the 1980 discussion of § 307(c)(1) was addressed to federal OCS activities. These remarks were also contemporaneous in light of the addition of this policy section.

³²This is a slight rewording of the test as stated in Secretary Watt's April 28, 1981 letter rejecting California's request for a consistency determination as follows: a federal activity directly affects the coastal zone only when "changes to coastal resources or physical actions are possible without subsequent decisions or actions." J.A. 133. NOAA rejected this definition as "extremely narrow and restrictive." Mediator's Report, H.R. Rep. No. 96-1012, *supra* at 84; see also, NOAA Issue Paper at 8.

the dictionary upon which DOI purportedly relies.³³ Indeed, none of the dictionary definitions of the word "directly" require any sort of "physical impact," or the lack of subsequent approval and review.

The second obstacle petitioners face is that examination of the dictionary makes clear that there is no single meaning for the word "directly". The word "directly" has a variety of meanings which vary with the context.³⁴ The question

³³The District Court noted that *Webster's New International Dictionary* (unabridged 3d ed. 1971) provides six alternative definitions for the word "directly":

- "1. a. without any intervening space or time; next in order; squarely, exactly;
b. in a straight line; without deviation of course, by the shortest way.
2. a. straight on; along a definite course of action without deflection or slackening;
b. purposefully or decidedly and straight to the mark; in a straightforward manner without hesitation, circumlocution, or equivocation; plainly and not by implication; in unmistakable terms; unqualifiedly;
c. without divergence from the source or the original;
d. simultaneously and exactly or equally.
3. in close relational proximity.
4. a. without any intervening agency or instrumentality of determining influence; without any intermediate step;
b. in the exact words of the original; verbatim.
5. a. in independent action without any sharing of authority or responsibility;
b. face-to-face, in person.
6. a. without a moment's delay; at once, immediately;
b. after a little, in a little while, shortly, presently." DOI Pet. at 58a-59a.

³⁴Indeed, even if this case were to be decided based on Webster's definitions, respondents should prevail. For example, DOI can scarcely deny that the impacts of exploration and development activities are "next in order" or "in close relational proximity" to a federal OCS lease sale. As the trial court acknowledged, it "... would be unrealistic to declare that the goal of Lease Sale No. 53 is merely leasing tracts and not 'pumping oil.'" DOI Pet. at 77a.

Petitioners' favorite definition is based on the tort doctrine of "no intervening cause." As the District Court concluded, this doctrine was created to limit liability and has no relevance to a statute designed to foster intergovernmental coordination. DOI Pet. at 59a.

However, even this tort definition does not help petitioners. As the District Court observed, *Black's Law Dictionary* (5th ed. 1979) defines

here is the meaning of "directly" within the context of an entire phrase, "directly affecting the coastal zone", as used within the CZMA. That phrase is not defined in the statute, and can scarcely be characterized as clear and unambiguous, as the history of this dispute and NOAA's frustrated attempts to formulate a definition attest.³⁵

In any event, the fatal flaw in petitioners' argument is that even if there were a "plain meaning" to the term at issue, it would not help them to avoid analysis of the legislative history which is so damaging to their position. While the starting point in every case involving construction of a statute is the language of the statute, the circumstances of enactment may persuade a court that Congress did not intend words of common meaning to have their literal effect. *Watt v. Alaska*, 451 U.S. 259, 265-266 (1981). When legislative history is available and relevant, the "plain meaning" rule

an "intervening cause" as one which "turns aside the *natural sequence of events*, . . . produces a result which would not otherwise have been *reasonably anticipated* . . . and destroys the causal connection" between the act and the effect. DOI Pet. at 60a, n. 16. The development of the tracts leased is certainly reasonably anticipated by both the lessor and the lessee. DOI Pet. at 61a. Indeed, that is precisely the reason that billions of dollars change hands in the course of an OCS lease sale.

To say that the direct effects of a lease are the intended uses of the property leased can scarcely constitute a departure from the "plain meaning" of the phrase "directly affecting the coastal zone." In short, the intermediate approval required for exploration or development/production under an OCS lease cannot be considered an "intervening cause." As a result, DOI has been forced to narrow the tort and dictionary definitions even further by adding irrelevant requirements such as "physical impacts."

³⁵In 1978, NOAA equated the term "directly affecting" with "capable of significantly affecting." 43 Fed. Reg. 10511 (1978). This approach was rejected by the Department of Justice, and was subsequently withdrawn by NOAA. 44 Fed. Reg. 37142 (1979). Contrary to the impression created by DOI (pp. 35-36), California has never relied on this rescinded definition, and the lower court specifically rejected it. DOI Pet. at 56a, fn. 13.

Following mediation between California and DOI on the "directly affecting" issue, the Secretary of Commerce determined that a new rule defining the term should be issued. However, NOAA deferred issuance of a new regulation pending completion of the Coastal Zone Improvement Act of 1980. NOAA 1981 Issue Paper at 9. In 1981, NOAA did issue a definition of "directly affecting," but has now withdrawn that definition as well. See DOI Pet. at 17a-18a.

cannot be invoked to prevent its use, however clear the words may appear on superficial examination. *Train v. Colorado Public Interest Research Group*, 426 U.S. 1, 9-10 (1976). The controlling consideration is congressional intent, not dictionary definitions. See *Cass v. United States*, 417 U.S. 72, 77 (1974).³⁶

Petitioners attempt to hide behind the "plain meaning" rule precisely because the legislative history makes clear that Congress intended an utterly different definition than the one they suggest, and that the threshold test is met when the federal agency initiates a series of events of coastal zone consequence. DOI's definition has nothing to do with the test posed by Congress and finds no support whatsoever in the legislative history. Not surprisingly, DOI is unable to cite a single piece of legislative history which would support its strained definition.

To the contrary, DOI's test contradicts legislative history. Rather than restricting effects to *physical* alteration of the coastal zone, Congress expressed an interest in a broad range of economic, geographic, social, aesthetic, and recreational impacts. H.R. Rep. No. 96-1012, *supra* at 34; S. Rep. No.

³⁶While *Bowsher v. Merck and Co.*, ____ U.S. ____, 103 S.Ct. 1587 (1983), is cited by petitioners (DOI Br. p. 21, WOGA Br. p. 35), it really supports respondents' position. In that case, this Court sought to determine the meaning of a different phrase ("directly pertain to and involve transactions relating to the contract") in a different statute. *Id.* at 1592. Although the Court's analysis began with the words of the statute, as is standard practice, it quickly shifted to an analysis of the legislative history of the statute and the Congressional purpose (*Id.* at 1592-1596), the very kind of analysis petitioners seek to avoid in this case.

The legislative history in the *Bowsher* case demonstrated that as originally introduced, the particular phrase at issue permitted access to "pertinent records." The author of the amendment adding the word "directly" in that particular statute specifically stated that his purpose was to limit the effect of the statute. *Id.* at 1592. On the other hand, in our case, the original language of the statute limited consistency to federal activities *in* the coastal zone. The change to "directly affecting" expanded the statute by extending consistency to activities *outside* the coastal zone. The *Bowsher* case clearly illustrates the necessity of determining what Congress intended by using "directly" in the CZMA, especially when the term is not defined in the Act.

92-526, *supra* at 10-11; see also 16 U.S.C. § 1451; 15 C.F.R. 923.13(b).

Similarly the requirement of no further federal agency approvals has nothing to do with Congressional intent. As Congress specifically indicated with respect to OCS activities, it contemplated that DOI's leasing activities must fulfill consistency requirements (under 307(c)(1)) *in addition* to the oil company/lessee consistency requirements that would follow at the exploration and development stages. H.R. Rep. No. 96-1012, *supra* at 28; S. Rep. No. 96-783, *supra* at 10-11. Congress intended consistency requirements to apply at *each* of these stages. *Id.* Indeed, to hold otherwise would contradict NOAA's regulations, which require consistency determinations for *each phase* of a major federal project, notwithstanding the fact that each subsequent stage is also subject to federal agency approval. See 15 C.F.R. 930.31(b), 44 Fed. Reg. 37146 (1979).

Instead of the broad, expansive test Congress desired (see Part I-A, *supra*), DOI has selected a narrow, restrictive definition. Instead of favoring *inclusion* of federal activities, DOI's definition is intended to *exclude* federal activities. The result of this approach, if permitted by this Court, is that a broad range of federal activities and programs would completely escape compliance with the CZMA, the direct opposite of what Congress intended in enacting the statute.³⁷

Of interest on this point is that after this litigation commenced, NOAA suddenly adopted Interior's definition. 46 Fed. Reg. 26658 (1981); 46 Fed. Reg. 35353 (1981). Shortly after NOAA finalized its rule, resolutions of disapproval were introduced in both the House and the Senate. Following a vote by the House Merchant Marine Committee to disapprove the regulation, NOAA rescinded it. 46 Fed. Reg. 50937 (1981); 47 Fed. Reg. 4231 (1982); 47 Fed. Reg.

³⁷It must be remembered that the threshold test of § 307(c)(1) is not limited to OCS activities. Rather, the definition of this phrase applies to *all* federal activities in or out of the coastal zone.

20110 (1982). NOAA stated that it withdrew the regulation because of negative Congressional reaction, including the reaction of the committees with oversight responsibilities with respect to the CZMA. 47 Fed. Reg. 4231 (1982).

We submit that this history demonstrates that NOAA, the agency charged with administering the CZMA, concluded that its regulation implementing Interior's definition of "directly affecting" is contrary to Congressional intent.³⁸ It would hardly be appropriate under these circumstances to revive DOI's definition by reliance on the "plain meaning" rule. Indeed, as the lower courts found, the legislative history cited by respondents is clearly a far more reliable guide to Congressional intent than is DOI's contrived definition, which has no support in the legislative history and frustrates the purposes of the Act.

II.

CONGRESS INTENDED THAT FEDERAL OCS PRE-LEASING AND LEASING DECISIONS ARE INCLUDED AMONG THE FEDERAL ACTIVITIES WHICH MUST COMPLY WITH CONSISTENCY REQUIREMENTS UNDER SECTION 307(c)(1) OF THE CZMA.

Having considered what Congress intended by the phrase "directly affecting the coastal zone", the threshold test of § 307(c)(1), we now turn to the second part of the critical inquiry in this case: how did Congress intend this "directly affecting" test to apply in the context of federal OCS pre-leasing and leasing decisions.³⁹ This discussion is necessary because DOI and WOGA devote substantial portions of their

³⁸After chastising respondents for relying on the 1980 Committee reports, it is indeed ironic that DOI relies on the *minority* views of the House Committee report concerning the 1981 resolution of disapproval. DOI Br. pp. 40-41. In any event, DOI misses the point. The point is simply that NOAA apparently determined the regulation was wrong.

Nor is there any question of a "legislative veto" here. NOAA had always treated the statutory disapproval procedure [16 U.S.C. § 1463a] as no more than a "report and wait" requirement. 46 Fed. Reg. 35253 (1981).

³⁹The effect and significance of the federal decision to lease OCS tracts is explained more fully in Part III. The decision includes a determination of where OCS development will occur (tract selection) and under what conditions (lease stipulations).

briefs to an attempt to establish an exemption from § 307(c)(1) for federal OCS pre-leasing and leasing activities (particularly tract selection).⁴⁰ However, petitioners' position is curious because it is inconsistent with their representations below. The Ninth Circuit stated: "... it is *conceded* on appeal that this section (§ 307(c)(1)) *does apply at the lease sale stage*." DOI Pet. at 12a⁴¹ (emphasis added).

Moreover, this attempt to exempt DOI's pre-leasing and lease sale activities has been rejected by both the Department of Justice and NOAA⁴² (see J.A. 36, 44-45, 58-59), in addition to every court that has considered this issue. The

⁴⁰See, e.g., WOGA Br. p. 16; Fed. Br. p. 21 ("An OCS lease sale does not directly affect the coastal zone because it does not authorize any activities that, prior to further federal approval and review, will have a physical impact upon that zone.") (emphasis added).

On exceedingly rare occasions, DOI has applied consistency to the presence of a lease stipulation which requires a physical alteration of the coastal zone. WOGA Br. p. 26 n. 19. However, it should be understood that under DOI's definition of "directly affecting", federal OCS tract selection is invariably exempt from consistency review. Mediator's Report, H.R. Rep. No. 96-1012, *supra* at 84. Likewise, the question of whether stipulations should be added to protect the coastal zone is excluded from consistency requirements under DOI's test.

⁴¹At the Ninth Circuit oral argument, counsel for DOI stated "... we are accused of saying this provisions [sic], (c)(1), is inapplicable to leasing. *We do not take that position. (c)(1) is applicable . . .*" January 15, 1982 transcript of Ninth Circuit argument p. 10, lines 10-20 (emphasis added).

⁴²Up until the commencement of this litigation, NOAA had consistently taken the position that federal OCS leasing activities fall within the requirements of § 307(c)(1). NOAA's repeated pronouncements to this effect are reviewed in some detail by the trial court. DOI Pet. at 55a-58a; see also, Memorandum of Eldon Greenberg, General Counsel, NOAA J.A. 58-59; see also NRDC Brief. The only NOAA regulations currently in effect are the ones adopted in 1979. These regulations do subject federal OCS activities to the consistency requirements of § 307(c)(1) (15 C.F.R. § 930.33(e)), and point out that application of consistency requirements to DOI's preleasing activities will lead to minimization of adverse environmental impacts. 44 Fed. Reg. 37142 (1979).

Although petitioners seek to confuse NOAA's position on this OCS issue with its discarded "significance" definition of "directly affecting" (DOI Br. p. 37), examination of NOAA's regulations makes clear that these issues are completely distinct. Long after NOAA abandoned the "significance" test, it continued to hold that DOI's pre-leasing and leasing activities required consistency review under § 307(c)(1). DOI Pet. at 56a, 57a; see also 44 Fed. Reg. 37142 (1979).

important point is that however the "directly affecting" test is defined, Congress has made clear that § 307(c)(1) was intended to apply to DOI's OCS pre-leasing and leasing decisions.

Examination of the 1972 legislative history contains some interesting insights on the application of §307(c)(1) to the OCS process. Although Congress made clear its recognition that the federal government retains paramount authority over all of its own lands, including OCS lands, it made equally clear that when activities on these lands directly affect the coastal zone, the federal activities must meet consistency requirements.⁴³

We have previously addressed the fact that the early versions of § 307(c)(1) applied only to activities *within* the coastal zone. See Part I, *supra*. However, even at that time Congress intended to apply consistency requirements to federal lands outside the coastal zone where those lands met the "functional interrelationship" test. S. Rep. No. 92-526, *supra* at 20, 30. This easy legislative history makes clear that consistency requirements under the "functional interrelationship" test were intended to include federal OCS lands. *Id.* at 20.

This point was also made in the 1972 Conference Report. The Report discussed Congress' adoption of the Senate version of the definition of coastal zone, specifying that federal lands, including OCS lands, are excluded from the definition of coastal zone," and federal interests therein are retained. However:

"As to the *use of such lands* [i.e. federal lands, including OSC lands] which would affect a state's coastal zone, the provisions of section 307(c) would apply."
H.R. Conf. Rep. No. 92-1544, *supra* at 12.

⁴³NOAA's regulations reiterate that the retention of federal jurisdiction over submerged lands (§ 307(e)) was not intended to eliminate the requirement that activities on such lands fulfill consistency requirements under § 307(c)(1). 44 Fed. Reg. 37146 (1979).

In 1976, Congress amended the Act, but made no changes to § 307(c)(1).⁴⁴ However, there are some references to the applicability of consistency requirements to the federal decision to lease. For example, the Senate Report expressed concern that:

“[t]here is very little communication between *Federal agencies* and the affected coastal states prior to major energy resource development decisions, such as the *decision to lease large tracts of the OCS* for oil and gas. . . . *Full implementation of the Coastal Zone Management Act of 1972* . . . could go far to institute the broad objectives of Federal-State cooperative planning *envisioned by the framers of the act.*” S. Rep. No. 94-277, 94th Cong., 1st Sess. 3 (1975) (emphasis added).

Furthermore, Congress in describing the federal OCS leasing activity stated:

“ . . . it is difficult to imagine that the original intent of the Act was not to include such a major federal coastal action within the coverage of ‘federal consistency.’ ” H.R. Rep. No. 94-878, *supra* at 52, 53; see also S. Rep. No. 94-277, *supra*, at 36-37 (as to federal OCS activities, “ . . . *under the act as it presently exists*, as well as the S. 586 amendments, if the activity may affect the state coastal zone and it has an approved management plan, the consistency requirements do apply.”) (emphasis added).

In 1976, Congress did change another section of the act, § 307(c)(3). That section applies to *applicants* for federal licenses and permits. Congress considered adding the word “lease” to the phrase “license or permit” in § 307(c)(3), and determined not to do so. Congress did, however, add subsection (B) which specifically addressed the consistency responsibilities of an OCS lessee and applicant (*i.e.*, the oil company applying for specific permits) at the exploration, development and production stages.

⁴⁴The 1976 legislative history is addressed in depth in the Brief of NRDC.

Petitioners improperly infer from this change an intent to exclude *federal* OCS activities from coverage under § 307(c)(1). However, they overlook the elementary fact that federal OCS activities (pre-leasing decisions and the lease sale itself) can *only* be covered by § 307(c)(1). Section 307(c)(3) is restricted to consistency requirements for the *applicant* for federal licenses and permits, in this case, the oil companies.⁴⁵

DOI has always argued that the addition of § 307(c)(3)(B) constituted the exclusive method by which OCS activities must comply with consistency requirements.⁴⁶ However, in 1979 the Department of Commerce disputed DOI's view, and the dispute was submitted to the Justice Department.⁴⁷ The Justice Department, like the lower courts, held that DOI's interpretation of this 1976 legislative history required an impermissible repeal by implication. J.A. 42-43, DOI Pet. at 48a. As the 1976 Conference Report explains, the addition of subsection (B) was intended solely to expedite consistency review for the oil companies' activities *after* the federal OCS lease sale was held. See H.R. Conf. Rep. No. 94-1298, 94th Cong., 2d Sess. 30-31 (1976); 122 Cong. Rec. 21230 (1976); see also DOJ opinion, J.A. 43. It had no impact on the federal lease sale and pre-lease sale decisions: *i.e.*, the selection of tracts and lease stipulations. J.A. 43.

⁴⁵As NOAA has interpreted the Act, (c)(1) is a residual category or catch-all category covering federal actions which are neither development progress under (c)(2), nor the activities of applicants for federal licenses and permits under (c)(3). 44 Fed. Reg. 37146 (1979)

⁴⁶It should be observed that DOI's argument that the addition of § 307(c)(3)(B) exempts OCS leasing from the purview of § 307(c)(1) is completely inconsistent with its admission that § 307(c)(1) does apply to the agency's OCS leasing activities.

⁴⁷NOAA's position is explained in a 1979 memorandum by its general counsel. Memorandum of Eldon Greenberg, J.A. 50-54. As NOAA pointed out, "neither the Administration nor Congress considered the question of exempting the Interior Department from its OCS pre-lease sale consistency obligations under section 307(c)(1)." J.A. 53. Indeed, the Department of Interior Solicitor's office conceded as much. J.A. 54.

Congress recently confirmed this. In explaining the effect of the 1976 addition of § 307(c)(3)(B), the 1980 Senate Report explains:

“The Department of Interior’s activities which *preceded lease sales* were to *remain subject* to the requirements of section 307(c)(1).” S. Rep. No. 96-783, *supra* at 11 (emphasis added).

Similarly, the House Report explained the 1976 addition of § 307(c)(3)(B) as follows:

“This amendment removed the need to examine individual leases under the general license and permit consistency section. This change *did not alter Federal agency responsibility* to provide states with a consistency determination related to *OCS decisions which preceded issuance of leases*.” H.R. Rep. No. 96-1012, *supra* at 26 (emphasis added).

The 1980 legislative history thus makes crystal-clear the fact that federal OCS pre-leasing and leasing decisions are covered by § 307(c)(1). The benefits of this system are explained as follows:

“As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, *as the Department of the Interior sets in motion a series of events* which have consequences in the coastal zone. Coordination must *continue* during the critical exploration, development and production stages.

“The Committee sees no justification to depart from this view.” S. Rep. No. 96-783, *supra* at 11 (emphasis added).

These statements are especially meaningful in light of Congress’ addition in 1980 of a Congressional finding stressing the need to resolve conflicts caused by OCS and

other energy activities.⁴⁸ As will be set forth in more detail *infra*, these conflicts can only be resolved in a meaningful fashion (at the "earliest practicable time") if the federal government is not permitted to escape responsibility for its critical OCS actions.

Finally, the legislative history of the 1978 Amendments to OCSLA confirms this result. As will be explained in more detail *infra*, Part III-A, OCSLA's legislative history reiterates that OCS activities — including federal lease sales and subsequent approval of development and production plans — must comply with the CZMA. H.R. Rep. No. 95-590, 95th Cong., 1st Sess. 153 n. 52 (1977).

In short, Congress has made clear its intent that the federal pre-leasing and lease sale decisions, *i.e.*, the decision of what tracts to lease and pursuant to what conditions (lease stipulations), falls within the consistency requirements of § 307(c)(1).⁴⁹

III.

DOI CANNOT ESCAPE ITS CONSISTENCY OBLIGATIONS UNDER THE CZMA BECAUSE ANOTHER STATUTE, OCSLA, ADDRESSES OCS DEVELOPMENT.

Having failed to convince the lower courts that DOI's OCS activities were exempt from the CZMA based upon the statute under consideration, petitioners have been forced to turn elsewhere. As a result, they now point to another statute, OCSLA, in hopes of persuading this Court that the

⁴⁸In 1980, Congress amended § 302 (16 U.S.C. § 1451) by adding the following finding:

"(f) New and expanding demands for food, energy, minerals, defense needs, recreation, waste disposal, transportation and industrial activities in the Great Lakes, territorial sea, and *Outer Continental Shelf* are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters." Pub.L. No. 96-464, *supra* n. 8 (emphasis added).

⁴⁹Quite apart from the legislative history, effectuating the purposes of the Act requires this result. To hold otherwise would allow significant federal programs to completely escape consistency review, frustrating Congressional intent.

1978 Amendments to the OCS Lands Act somehow negated the requirements of the 1972 CZMA.⁵⁰ This argument was rejected by the Department of Justice and by NOAA, in addition to the lower courts. DOJ Opinion, J.A. 43-45; Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 54-57. Not only is it an impermissible repeal by implication, but the argument is also flatly contradicted by explicit Congressional history of OCSLA demonstrating that both the statutes were intended to apply to DOI's OCS leasing activities. *Id.*

Petitioners also suggest that because OCSLA requires staged decision-making, DOI should be able to defer its obligations until the stage when it has maximum information. This would, of course, be the exploration and development/production stages, when the leases are owned by private companies. However, it is too late at that stage to determine whether DOI should have selected these tracts for development in the first place. The fact is that DOI has a good deal of information at the lease sale stage (including an environmental impact statement), and that this is the very information that enables DOI to make its pre-leasing and leasing decisions. By the same token, coastal management programs can also be taken into account in reaching these decisions. To do so would effectuate Congress' clear intent to have DOI comply with consistency requirements in making its broad decisions at the lease sale stage (*i.e.*, what parts of the OCS should be developed and under what generic conditions) and to also have the oil companies comply with consistency requirements at the discreet subsequent stages in making the *specific* decisions on how an individual tract should be developed (*i.e.* where individual wells should be located, what equipment should be used, etc.).

⁵⁰WOGA is quite candid in this respect, stating that it is OCSLA, not the statute at issue, which should be given "initial scrutiny" in determining the meaning of language in the CZMA. WOGA Br. p. 21. This approach is, of course, contrary to every accepted tenet of statutory construction. In any event, petitioners' argument concerning OCSLA is, once again, completely inconsistent with their admission that § 307(c)(1) applies to DOI's OCS leasing activities. See p. 25, *supra*.

A. OCSLA Was Never Intended to Nullify the Requirements of the CZMA.

Petitioners suggest that because OCSLA addresses the development of OCS resources, that statute contains the exclusive statutory obligations of the federal government vis a vis OCS activities. The flaw in this argument is that apart from OCSLA, a broad variety of federal statutes apply on the OCS including NEPA, the Endangered Species Act, the Marine Mammal Protection Act, and the CZMA.⁵¹ Not only is petitioners' assertion belied by the CZMA (Part II, *supra*) it is also contradicted by OCSLA, the very statute upon which petitioners seek to rest their claim.

Congress made this point clear in enacting a savings clause as part of the 1978 OCSLA Amendments as follows:

"Except as otherwise *expressly* provided in this Act, nothing in this Act shall be construed to modify, or repeal any provision in the Coastal Zone Management Act of 1972. . . ." 43 U.S.C. § 1866; H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. 161 (1978) (emphasis added).

Moreover, § 19 of OCSLA is the section which specifically addresses states' rights at the lease sale stage under that statute. In enacting this section, Congress expressly stated that OCS activities at the *lease sale stage* must also comply with CZMA consistency requirements:

"The committee is aware that *under the Coastal Zone Management Act* of 1972, as amended in 1976 (16 U.S.C. 1451 et seq.), *certain OCS activities including lease sales and approval of development and production plans must comply with 'consistency' requirements* as to coastal zone management plans approved by the Secretary of Commerce. Except for specific changes made by Title IV and V of the 1977 Amendments, nothing in this act is intended to amend, modify, or repeal any provision of the Coastal Zone Management

⁵¹This point is addressed in more detail in the NRDC Brief. It should be noted that all of these statutes apply to DOI's lease sale activities.

Act. Specifically, *nothing is intended to alter procedures under that Act for consistency* once a State has an approved Coastal Zone Management Plan."⁵² H.R. Rep. No. 95-590, *supra*, at 153 n. 52 (emphasis added).

Congress could not have made its intentions more clear. Congress intended that *both* OCSLA and the CZMA would apply at the lease sale stage.⁵³ This was confirmed two years after the 1978 OCSLA Amendments when Congress re-enacted the Coastal Zone Management Act, flatly stating that § 307(c)(1) was intended to cover DOI's leasing activities. S. Rep. No. 96-783, *supra* at 11; H.R. Rep. No. 96-1012, *supra* at 28. Rather than repeal by implication, there is Congressional reaffirmation that DOI's leasing activities must comply with § 307(c)(1).

Nevertheless, petitioners assert that state participation under OCSLA is exclusive and eliminates any state influence on OCS decisionmaking under the CZMA. DOI Br. p. 42; WOGA pp. 23, 31-32. This is nothing more than a restatement of their argument that OCSLA negates the CZMA;

⁵²This Report is entitled to particular weight because the final bill followed the House version.

⁵³Petitioners imply that since OCSLA makes consistency obligations explicit at the exploration and development/production stages, its failure to make these consistency obligations explicit at the lease sale stage confirms the exemption they seek. However, the legislative history of § 19 clearly lays such claims to rest, by making clear that OCSLA required the application of consistency requirements to federal OCS lease sales *and* to the subsequent stages.

In making the consistency obligations of the oil companies explicit at the subsequent stages, the 1978 Amendments to OCSLA merely attempted to parallel the references in § 307(c)(3)(B) of the CZMA. This had no effect on the residual *federal* activities covered by § 307(c)(1).

Moreover, a variety of federal obligations pertain at the lease sale stage despite the fact that they are not mentioned in OCSLA, and even though they apply at subsequent stages. For example, although not required by OCSLA's express terms, DOI prepares an EIS under NEPA at the lease sale stage, even though it may also have to do so at subsequent stages (and the OCSLAA reference to the subsequent stages is explicit, 43 U.S.C. § 1351(e)). Similarly, when endangered species are affected by OCS activity, federal agencies prepare an Endangered Species Act biological opinion at the lease sale stage *and* at the subsequent stages, even though OCSLA does not address this requirement. *North Slope Borough v. Andrus*, 642 F.2d 589, 607-611 (D.C. Cir. 1980).

the fact is, that Congress intended the two statutes to complement one another.

As the trial court explained in some detail, both statutes may co-exist. DOI Pet. at 51a-55a. While OCSLAA primarily emphasizes development of the OCS, the CZMA is directed to environmental concerns, *i.e.*, the long-term protection of the coastal zone. *Id.* The obligations and rights imposed by the two statutes differ but can be integrated.⁵⁴

Section 19 of OCSLAA provides governors with the opportunity to make recommendations on the size, timing and location of a lease sale. It only applies, of course, where the governors do in fact make such recommendations. However, unless the governors' recommendations strike a reasonable balance between the national interest (as defined in OCSLA), and the local interest, they need not be accepted by the Secretary. 43 U.S.C. § 1345.

Unlike governors' recommendations under OCSLA, § 307(c)(1) of the CZMA applies in the first instance only to those states which actually have an approved coastal management program.⁵⁵ *County of Suffolk v. Secretary of Interior*, 562 F.2d 1368, 1379-1381 (2nd Cir. 1977). However, it is the federally approved *program* itself with which DOI's activities are to be consistent "to the maximum extent practicable." Thus federal agencies are required to consider

⁵⁴Indeed, Congress made clear that the two statutes are integrated in some way at every OCS stage. Although DOI need not comply with the consistency requirements of § 307(c)(1) during the earliest stage, formulation of a broad national leasing program, DOI is required to at least *consider* state coastal zone management programs in formulating the national leasing program. H.R. Conf. Rep. No. 95-1474, 95th Cong., 2d Sess. at 103 (1978). However, at the lease sale stage, DOI is required to *comply* with the consistency requirements of § 307(c)(1). H.R. Rep. No. 95-590, *supra* at 153, n. 52; 1980 CZMA history, H.R. Rep. No. 96-1012, *supra*. At the subsequent stages, the oil companies are required to comply with consistency requirements regarding the specific activities in their exploration and development/production plans. 43 U.S.C. §§ 1340(c)(2), 1351(d); 16 U.S.C. § 1456(c)(3)(B).

⁵⁵Congress intended to provide coastal states with federally approved coastal management programs with special status. As NOAA concluded, "[s]ection 19 was conceived as an *additional* protection for states." Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 56 (emphasis added).

coastal management programs "as *supplemental requirements* to be adhered to in addition to existing agency mandates." 15 C.F.R. 930.32(a) comments; 44 Fed. Reg. 37146 (1979)⁵⁶ (emphasis added). Whether DOI's leasing decisions are in fact consistent will depend on the provisions of each approved program.

Thus, there may be cases where the CZMA applies but the governor does not object to a lease sale under § 19 of OCSLA, or the Secretary properly rejects the governor's recommendation because it does not strike the statutory "reasonable balance." There will be other cases where the governor makes a balanced recommendation, but the state does not have a federally approved coastal management program. However, even when both statutes are applied to the same sale, they are not inconsistent. The governor's recommendation may address a variety of issues which are not part of that state's approved coastal management program, and vice versa.⁵⁷ As the lower courts ruled, each statute addresses different Congressional goals, both of which can be given expression.⁵⁸ See Brief of NRDC. As WOGA has conceded:

"Recognition of the primacy of the Secretary's authority at the leasing stage implied by Section 19 *by no means entitles a Secretary of the Interior to proceed with OCS leasing in disregard of state CZMA programs.*" WOGA Br. p. 26 (emphasis added).

We agree.

⁵⁶It should be noted that under OCSLA, § 19 only applies if a governor makes recommendations to DOI. Under the CZMA, state recommendations are not a prerequisite.

⁵⁷For example, a governor's recommendations can address non-environmental issues such as bidding procedures, drainage issues (43 U.S.C. § 1337(g)), etc., while the coastal zone management program must be specifically addressed to protection of the coastal zone.

⁵⁸Petitioners can hardly question this since § 19 of OCSLAA also gives the governor the authority to submit recommendations on a proposed development and production plan (43 U.S.C. § 1345) even though such plans must also comply with CZMA consistency requirements (43 U.S.C. § 1351(d)).

B. OCSLA's Staged Decisionmaking Does Not Permit DOI to Escape Its Consistency Obligations at the Lease Sale Stage Simply Because the Oil Companies Have Separate Obligations at Subsequent Stages.

Petitioners tried to persuade the lower courts that DOI's CZMA consistency obligations at the lease sale stage were excused by virtue of the separate CZMA obligations of the oil companies at the subsequent stages pursuant to § 307(c)(3)(B), 16 U.S.C. § 1356(c)(3)(B). When this argument proved unavailing under the CZMA, they attempted to resurrect it in a new form under OCSLA; this time they argued that since OCSLA provides for staged decisionmaking, their obligations at the lease sale stage can be deferred until the subsequent stages.

The lower courts properly rejected this argument because, as has already been discussed, the legislative history of both OCSLA and the CZMA makes clear that Congress intended consistency requirements to apply both to DOI's pre-leasing and leasing decisions *and* to the oil companies' specific activities at subsequent stages. In any event, the argument must fail because DOI's OCS activities can only be reviewed for consistency when its pre-leasing and leasing decisions are made — which is, of course, at the lease sale stage.

At the outset, it is important to make clear what transpires at the pre-lease and lease sale stage. This is the time when, based upon all of the information it has gathered (including an Environmental Impact Statement), DOI makes its critical decisions as to what portions of the coast will be offered for lease (tract selection), at what time, and pursuant to what protections (lease stipulations). Few federal decisions could have more dramatic impacts on the coastal zone.

DOI's decision is essentially a subdivision of the OCS, creating both a right to develop and the conditions under which development can take place.⁹⁹ As the Ninth Circuit

⁹⁹Industry will not buy all the tracts nor will they find petroleum on all the leases they do buy. Nevertheless, DOI's decision to offer certain tracts (and not to offer others) sets the basic parameters on where there can be an industry right to produce, develop, and transport petroleum.

concluded, DOI's choices:

"determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to dangers, the flow of vessel traffic, and the siting of on-shore construction."

DOI Pet. at 13a; see also DOI Pet. at 45a, 62a-65a.

DOI's decision also defines where along the coast vessel collisions, well blowouts and other accidents may cause oil spills that can adversely affect coastal recreation areas, sea bird and marine mammal habitats, and other coastal zone resources — the very resources Congress sought to protect by enactment of the CZMA.

Accordingly, it is at the lease sale stage that the federal government itself deletes tracts because of environmental concerns, as Interior Secretary Andrus did for Lease Sale 48 offshore Southern California.⁶⁰ It is also at this stage that DOI imposes generic conditions on lessees that would protect coastal zone resources.⁶¹

While petitioners seek to portray an OCS lease sale as a mere transfer of paper, nothing could be further from the truth. An OCS lease is defined in OCSLA as a document which ". . . *authorizes exploration for and development and production of minerals.*" 43 U.S.C. § 1331(c) (emphasis added). Although it is true that after receiving a lease the oil company must still obtain certain additional specific permits at the subsequent stages, the usual assumption is that once a federal OCS lease is issued, the lessee will be able to develop that tract. Indeed, the lessee is *required* to develop the tract within a set period of time or he will lose his rights. 43 U.S.C. § 1337(b)(2).

⁶⁰Letter, June 29, 1979, from Secretary Andrus to Governor Brown; see also Brief of Local Governments.

⁶¹See Memorandum, October 10, 1979, to Secretary from Solicitor, on "Consistency of Outer Continental Shelf (OCS) Pre-lease Activities with Coastal Zone Management Programs" at 8; Exh. L-11, C.R. 3; *Alaska v. Andrus*, 580 F.2d 465, 471 (D.C. Cir. 1978), vacated in part as moot, 439 U.S. 922.

Thus, for example at the exploration stage, the lessee requests approval of his *specific* exploration activities, such as a description of the equipment he plans to use, the location of an individual exploratory well to be drilled, etc. See 43 U.S.C. § 1334(3). Later the oil company obtains approval for a development and production plan, again addressing the specific facilities and operations which will be constructed or utilized. 43 U.S.C. § 1351(a). At this stage, the exploration and development/production plans are only required to focus on the specific activities that will occur on an individual tract. 39 C.F.R. §§ 250.34-1(a)(1), 250.34-2(a)(1). The question at these stages is not *whether* a particular tract should be developed, but *how* that particular tract should be developed.

By contrast, the time to determine *whether* a particular tract should be developed at all is at the lease sale stage. After the oil companies have spent billions of dollars to acquire property rights at a federal OCS lease sale,⁶² it is a little late to be telling them, for example, that portions of the sale immediately adjacent to critical coastal zone resources should not be developed at this time, or that they should be developed only with certain protections (stipulations) for coastal zone resources.

In short, the time to consider *whether* development of an OCS tract can occur must be at the lease sale stage. The subsequent stages assume that this threshold decision has already been made, and the question at the later stages is *how* to develop the tract.⁶³

⁶²As DOI pointed out, in Lease Sale 53 high bids totalling \$2.038 billion were tendered. DOI Br. p. 47 n. 44. In fact, Chevron's bid for one tract alone was \$333,600,000. *Los Angeles Times*, April 29, 1981, Part 1 at 1. It is ludicrous to argue, as petitioners have, that the oil companies expend these enormous sums of money at the lease sale stage for nothing more than the right to *apply* for permits at the later stages.

⁶³Although petitioners seek to create the impression that federal OCS leases can be cancelled at will, the fact is that cancellation can occur only in exceedingly rare circumstances, and at major expense to the taxpayer. 43 U.S.C. § 1334. Furthermore, it was Congress' belief that disapproval of development and production plans "for environmental reasons would be *most unusual*." H.R. Rep. No. 95-590, *supra* at 169.

Furthermore, unless consistency requirements are applied at the lease sale stage, DOI's activity in the OCS process completely escapes consistency review. The federal OCS pre-leasing and leasing decisions can *only* be reviewed under § 307(c)(1). Acceptance of DOI's argument frustrates the purpose of the CZMA because federal programs directly affecting the coastal zone were intended to fulfill consistency requirements.

By contrast, at the exploration and development/production stages, the leases are in the hands of individual oil companies. At this point, any discussions about consistency must take place between the state and the holders of the leases of individual tracts; under normal circumstances, the federal government does not even participate in this process.⁶⁴ See 16 U.S.C. § 1346(c)(3)(B). As a result, consistency review is completely piecemeal, and there is no meaningful ability to address the cumulative effects of the sale as a whole on the coastal zone.⁶⁵

Nevertheless, petitioners argue that it makes more sense to wait for later stages because more information is available at that time.⁶⁶ However, DOI itself makes decisions con-

⁶⁴The only exception is in the rare instance of an override of the state decision by the Department of Commerce. 16 U.S.C. § 1356(c)(3)(B). DOI, however, plays no part in this process.

⁶⁵This point is addressed in more detail in the Brief of Local Governments. However, it can be illustrated by a history of the submission of oil company exploration and development plans for the Santa Barbara Channel between 1978 and mid-1981. See July 1, 1981 Affidavit of Mari Gottdiener, and Exhibits thereto. J.A. p. 152 *et seq.* At an OCS lease sale, individual oil companies acquire the rights to develop various tracts. Thereafter, these companies apply for consistency certification of their exploration and development plans at different times, and often for one tract at a time. For example, Chevron submitted the first plan in December 1978, followed by Exxon submittals in February and March 1979, Sun Production in May 1979, and so on for a total of twenty-seven separate submittals through June 1981. *Id.*

⁶⁶The logical extension of this argument is that all OCS decisions would be deferred until the production stage, when information is maximized. WOGA implies as much, by suggesting that not even oil exploration (which, like oil development and production, can lead to oil spills) has much effect on the coastal zone. WOGA Br. p. 27, n. 21, p. 28. However, OCSLA does not permit such deferral. *State of California v. Watt*, 666 F.2d 1290, 1306 (D.C. Cir. 1981) (holding that DOI could not meet its obligations to properly plan the national five year OCS program in the context of a decision on the placement of a particular exploratory well). Neither does the CZMA.

cerning tract selection and lease stipulations at the lease sale stage on the basis of the best available information because this is the *only* time such decisions can be made.⁶⁷ By the same token, this is the only time when a determination can be made as to whether tract selection and lease stipulations are consistent with the coastal zone management program.⁶⁸ Although the continual collection and assimilation of pertinent information must continue throughout the OCS process, OCSLA itself requires that DOI at each stage base its decisions upon the best information available at that time. *State of California v. Watt*, *supra* n. 66, 668 F.2d at 1307.

The fact that OCSLA, like other federal statutory regimes, provides for staged decisionmaking does not allow DOI to escape its CZMA consistency obligations at any particular stage. To the contrary, NOAA's regulations require that where a federal agency engages in phased decisionmaking based upon developing information, a consistency determination is required for *each* major decision so that the agency can ensure that the project *continues* to be consistent. 15 C.F.R. § 930.37(c); 44 Fed. Reg. 37148 (1979). This is precisely what Congress said about the CZMA. S. Rep. No. 96-783, *supra* at 11.

Nor would the oil companies' consistency requirements at the subsequent stages be merely duplicative. The more specific information that is available at these subsequent stages will be needed to address the more specific issues that arise at these stages, *i.e.*, what specific equipment will be used, where platforms will be placed, etc. In short, the

⁶⁷Petitioners seek to minimize the extensive information available at the lease sale stage while at the same time emphasizing the years of study that precede DOI's lease sale decisions, commencing with the formulation of the National Five Year Leasing Program. They ignore the fact that an environmental impact statement is prepared at the lease sale stage which, along with supplemental information (see, *e.g.*, 43 U.S.C. § 1352), resource estimates, etc., provides DOI with information the agency believes is sufficient to make its leasing decisions.

⁶⁸As the Department of Justice recognized in 1979 "... some of the pre-leasing activities of the Secretary will give rise to consistency problems which cannot be reviewed at all under the paragraph [307(c)(3)] (B) procedure, or for which such review comes too late." J.A. 43.

development of information under the stages of OCSLA is entirely appropriate to the decisions made at each stage, including the application of § 307(c)(1) at the lease sale stage.⁶⁹

IV.

APPLICATION OF A CONGRESSIONAL SCHEME FOR COASTAL ZONE MANAGEMENT IS CONSISTENT WITH FEDERAL PARAMOUNTCY TO THE OCS.

Finally we must dispose of the issue that is at the bottom of all of petitioners' arguments. While Congress clearly desired to allocate the states certain limited rights in the OCS decisionmaking process, petitioners are dissatisfied with this congressional scheme. As a result, they attempt to alarm this Court by suggesting that the exercise of these states' rights is somehow contrary to the national interest and that it grants states an unintended "veto" which is inconsistent with paramount federal authority on the OCS. Petitioners are wrong on both counts.

Petitioners seek to create the impression that application of the CZMA at the lease sale stage will somehow benefit the states in derogation of the national interest. Indeed, they suggest that while there is a "national interest" in the "expedited development of vital resources on the outer continental shelf,"⁷⁰ there is only a "states' interest" in the

⁶⁹Petitioners cite a number of cases decided under statutes other than the CZMA — such as NEPA and the Endangered Species Act. Fed. Br. pp. 22, 28 n. 29; WOGA Br. pp. 34, 45. However, as the trial court explained, these statutes have a much narrower focus than the CZMA, which is intended to comprehensively manage the coastal zone for this and future generations. DOI Pet. at 77a. Ironically, however, one of the cases they cite demonstrates that the Endangered Species Act requires consultation *both* at the lease sale stage *and* at the subsequent stages. *North Slope Borough v. Andrus*, 642 F.2d 589, 607-611 (D.C. Cir. 1980) ("The earlier in the progress of a project a conflict . . . is recognized, the easier it is to design an alternative consistent with the requirements of the act, or to abandon the proposed action.").

In any event, petitioners conveniently ignore the fact that consideration of the statute at issue here — the CZMA — has come out against them in the courts which have considered the issue. *Kean v. Watt*, *supra*; *California v. Watt*, *supra*, 17 E.R.C. 1711.

⁷⁰In so stating, petitioners overlook the fact that while OCSLA is primarily concerned with development⁸ of the OCS, the statute also makes clear Congressional intent to protect the environment. 43 U.S.C. §§ 1802(b)(7), 1332(5); 1332(4); 1802(4), (5), (6).

preservation, and protection of the coastal zone. Fed. Br. p. 19.

Congress would be indeed surprised to hear this. The entire purpose of the CZMA was to protect the "national interest" in preserving the coastal zone, which is a *national* treasure. 16 U.S.C. § 1451(a); H.R. Rep. No. 92-1049, *supra* at 9.

In essence, DOI seeks to unilaterally elevate the national interest in OCS development over the national interest in coastal zone protection. However, only Congress can make such a choice. To date, Congress has made clear its desire to advance *both* national interests. This can only be done if § 307(c)(1) is applied to DOI's leasing activities.

Nor is this inconsistent with federal paramountcy on the OCS. It must be remembered that it is by virtue of the very federal authority championed by petitioners that Congress has applied a variety of statutes on the OCS — including the CZMA.⁷¹

The CZMA itself is a carefully crafted scheme which spells out the very federal and states' rights that are at issue in this case. Federal-state cooperative planning and coordination are at the heart of the Act. S. Rep. No. 94-277, *supra*, at 3; 16 U.S.C. § 1457(c). See Part I-A, *supra*. As a result of this statutory scheme, states with federally approved coastal zone management programs are given a greater role in OCS decisionmaking than states without such programs. See e.g., 16 U.S.C. § 1456(c)(3)(B); Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 59. However, the entire statutory scheme has built-in federal controls

⁷¹In addition, WOGA argues that to apply the CZMA on the OCS would undermine federal rights established by virtue of the "1953 Compromise." WOGA Br. pp. 17-21. While this issue is more fully addressed in NRDC's Brief, the point is simply that the 1953 Compromise has nothing to do with this case. The states are not trying to re-argue ownership issues, and no one disputes that the federal government has paramount authority on the OCS. The only question here is whether DOI will be required to recognize certain limited rights that Congress has granted the states. If anything, it is petitioners' argument that undermines federal authority by suggesting that Congress cannot give the states any authority in an area of federal jurisdiction.

and safeguards that prevent any arbitrary exercise of the state's consistency rights.

Federal agencies exercise significant power over the content of coastal zone management programs. While states initially develop such programs, they have no effect under the CZMA unless they meet national criteria and are approved by the federal government. 16 U.S.C. §§ 1455(c), 1456(c)(1). The Secretary of Commerce may not give the required approval "unless the views of federal agencies principally affected by such program have been adequately considered." 16 U.S.C. § 1456(b). DOI is among the federal agencies consulted during this process, and specifically was involved in the approval of California's Coastal Zone Management Program. California Coastal Management Program, Attachment J at 20; Exh. L-18; C.R. 3.

Moreover, Congress gave special attention to energy production, both on the OCS and elsewhere. Unless the Secretary of Commerce finds that a state program provides for adequate consideration of the national interest in energy production, he must disapprove it. 16 U.S.C. § 1455.⁷²

In addition to the controls imposed during the development of the program, it must be remembered that after the program is approved, it is the *program itself* with which the federal activities must be consistent. NOAA's regulations make clear that under 307(c)(1) (and 307(c)(2)), it is the *federal agency* that makes the consistency determination. 15 C.F.R. § 930.34.⁷³ NOAA's regulations then provide

⁷²Indeed, California's program has been specifically reviewed on the question of whether it satisfied this requirement, and the Ninth Circuit ruled that it did. *American Petroleum Institute v. Knecht*, 609 F.2d 1306, 1315 (9th Cir. 1979). Furthermore, the Court found that the California Program and the CZMA contained adequate safeguards to protect against any arbitrary exercise of the state's consistency powers. *Id.*

⁷³This does not mean that the federal agency can simply ignore the views of the state. NOAA's regulations demonstrate that the federal agency is expected to reach its determination through a process of coordination with the state, and both governments are encouraged to work out their differences. 15 C.F.R. §§ 930.39-930.44. As a preliminary matter, federal agencies are strongly encouraged to obtain the views and assistance of the state agency in formulating the determination. 44 Fed. Reg. 37148 (1979) (comment to 15 C.F.R. § 930.39(a)). On matters where the interpretation of the state's program is at issue, the state, as the body that developed the program, would likely be given substantial deference.

that the state has a right to disagree with the federal agency's consistency determination, stating the reasons for its disagreement and describing alternative measures which, if adopted, would allow the activity to proceed consistent with the program. 15 C.F.R. § 930.41-42.

If there is disagreement, the regulations contemplate negotiation and cooperative efforts between the parties to resolve their differences, either on their own or through mediation by the Secretary of Commerce.⁷⁴ 15 C.F.R. § 930.43-44. If the disagreement cannot be resolved, the federal agency has the ability to proceed.⁷⁵

All of this is to be contrasted the Congressional scheme under § 307(c)(3), when the consistency of private industry is at issue. Under this section, if the state objects because the activity is inconsistent with the program, the activity simply cannot go forward.⁷⁶ 16 U.S.C. § 1456(c)(3).

It is thus clear that when Congress chose to give states the authority to unilaterally stop activities, it said so. At the same time, however, under § 307(c)(1), the federally approved coastal zone management program becomes a *substantive requirement of federal law* to be complied with along with all other applicable federal requirements. See 15 C.F.R. § 930.32 and comments thereto, 44 Fed. Reg. 37146 (1979). This is not a "veto," since it is the *program* with which the federal activities must be consistent. Rather, this is the application of a *federal scheme* for the protection of

⁷⁴Indeed, the mediation provisions of the CZMA were expanded in 1976 precisely because Congress foresaw that these kinds of federal-state disagreements could occur. H.R. Rep. No. 94-1298, 2d Sess. 52 (1976).

⁷⁵The fact that the statute does not automatically preclude the federal agency from going forward with the activity does not necessarily mean that the agency is in compliance with the CZMA. As with other federal agency actions in violation of federal statutes, the state can bring suit if the agency's action should be stopped because it is inconsistent with the coastal zone management program.

⁷⁶"No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's [consistency] certification. . . ." 16 U.S.C. § 1456(c)(3)(B) (emphasis added). The state's objection can be overridden by the Department of Commerce in certain circumstances. 16 U.S.C. § 1456(c)(3).

our *national* coastal zone.⁷⁷

Nor does petitioners' repeated reliance on OCSLA help their cause. Even OCSLA makes clear that while states were not intended to have a "veto" over federal OCS activities pursuant to OCSLA, they were intended to be given a "leading role" in federal OCS decisionmaking, notwithstanding federal paramountcy on the OCS. H.R. Conf. Rep. No. 95-1474, *supra* at 106; H.R. Rep. No. 95-590, *supra* at 52-53. Indeed, one of the primary purposes of the 1978 Amendments was to limit the DOI's discretion under the OCSLA with a corresponding increase of state participation in OCS decisionmaking. H.R. Rep. No. 95-590, *supra* at 50, 104-06, 152, 153.⁷⁸ As a result, OCSLA now permits governors to make lease sale recommendations which must be accepted by DOI when certain criteria are met. 43 U.S.C. § 1345.

In short, petitioners' spectre of hypothetical state abuse of § 307(c)(1) consistency requirements is completely un-

⁷⁷As NOAA has stated, even after federal approval, the program must continue to be responsive to federal requirements or approval may be withdrawn. J.A. 60; see also 6 U.S.C. § 1458(d). Moreover, Congress retained the ability to review and remedy any possible state abuse through an annual review of activities found to be inconsistent with approved programs. 16 U.S.C. § 1462(a)(6). Indeed, Congress during its recent oversight proceedings did review the states' consistency record, and found that they had not abused their authority:

"A concern was raised at the hearing that § 307 may be used by the states to override Federal authority in OCS leasing activities. This had not been borne out by the record to date. It may be useful to note that state coastal zone management plans are approved under § 306, and are the direct result of, and must continue to be responsive to, a set of Federally mandated goals set out in the Coastal Zone Management Act in order for Federal consistency to continue to be applicable at the state level." S. Rep. No. 96-783, *supra*.

⁷⁸OCSLA also permits state law to fill in the gaps in federal OCS law. 43 U.S.C. § 1333(2)(A).

As explained above, pp. 33-35, the states' rights under OCSLA are in addition to those derived from the CZMA, and apply under different conditions. As NOAA concluded in 1979, Congress intended additional benefits for states which expended the significant effort necessary to develop coastal programs addressing national concerns: "States with approved programs are provided with both mandatory CZMA consistency authority and discretionary OCS Lands Act (§ 19) gubernatorial recommendations. . . ." Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 59.

founded. Their position in this case is nothing more than an attempt to exempt DOI's OCS activities from a federal statute which is applicable to all other federal agencies, and, indeed, even to all of DOI's other activities.⁷⁹ However, such an exemption would undermine the purpose and policies of the CZMA, and would flatly contradict Congressional intent to include DOI's pre-leasing and leasing activities within § 307(c)(1) requirements.

Nor would application of § 307(c)(1) unduly disrupt OCS activities. DOI is now preparing consistency determinations on all OCS lease sales throughout the United States with the sole exception of the tracts at issue in Lease Sale 53. NOAA has concluded that application of consistency requirements at the lease sale stage would actually reduce conflicts with affected states and avoid delay during the subsequent stages. 44 Fed. Reg. 37142 (1979). Indeed, to hold otherwise would undoubtedly *increase* litigation, because consistency issues would have to be resolved *one tract at a time* and one exploration or development/production plan at a time. See Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 60-61.

In sum, the states are not seeking to interfere with the paramount authority of the federal government on federal

⁷⁹As NOAA explained in 1979:

"Failure to apply 307(c)(1) to Interior's OCS activities would constitute the *only* exemption to the federal consistency requirements of the CZMA, thus establishing a seriously harmful precedent for other federal activities significantly affecting the coastal zone. The exemption is particularly unreasonable in light of the fact that other Interior public land management activities which significantly affect the coastal zone (e.g., *onshore oil and gas, geothermal and coal development*) are subject to the federal consistency requirements. Allowing this adverse precedent to be set would encourage other federal agencies to claim implied exemptions whenever "state consultation" procedures are incorporated in legislation enacted subsequent to the 1972 CZMA. Accordingly, *an exemption for Interior could be the first step towards serious erosion of the consistency provisions, and consequent intergovernment conflicts.*" Memorandum, March 23, 1979, of Eldon Greenberg, J.A. 61 (emphasis added).

lands. Instead, we seek only the rights Congress has granted us in order to implement the national interest in preserving and protecting the coastal zone.

V.

**LEASE SALE 53 "DIRECTLY AFFECTS THE COASTAL ZONE"
OF CALIFORNIA WITHIN THE MEANING OF SECTION
307(c)(1).**

The ultimate question in this case is whether, as the lower courts found, Lease Sale 53 "directly affects the coastal zone" within the meaning of § 307(c)(1). This of course turns entirely on the preceding discussion concerning the meaning of this threshold test and how Congress intended it to apply within the context of OCS leasing activities.

Congress clearly intended that § 307(c)(1) and its threshold test be interpreted broadly so that states would be provided with an incentive to develop and apply coastal management programs, and so that federal activities would not contribute to the degradation of the coastal zone. Only through the development and application of such programs would the goal of preserving our precious coastal zone resources be achieved. It was on this basis that Congress first suggested the "functional interrelationship test," as well as its alternative formulation that a federal activity directly affects the coastal zone when it initiates a series of events of coastal management consequence.

DOI and WOGA have argued for a restrictive definition of the threshold test which would effectively exclude DOI's OCS pre-lease and lease sale activities from § 307(c)(1), and for a blanket exemption of OCS pre-lease activities. However, as we have shown, the definition urged by DOI has no support in the legislative history of the CZMA and is not even supported by those authorities upon which DOI relies. Moreover, the legislative histories of both the CZMA and OCSLA, and the opinions of the Department of Justice and NOAA all demonstrate that OCS pre-lease and lease sale activities are not exempt from § 307(c)(1); DOI has previously conceded as much.

Thus, the definitions of "directly affecting the coastal zone" suggested by Congress, adopted by the lower courts,

and urged here by respondents must be employed to determine whether Lease Sale 53 "directly affects" the California coastal zone. Applying those definitions leaves little doubt that Lease Sale 53 initiates a series of events of coastal zone management consequence and has a "functional interrelationship" with the California coastal zone. DOI Pet. 12a-13a, 62a-65a.⁸⁰ As the Ninth Circuit ruled, Lease Sale 53 establishes the first link in a chain of events leading to oil and gas development. DOI Pet. at 13a. Application of consistency requirements to this lease sale is all the more important because the leasing of these tracts has enormous implications for the coastal zone development that accompanies OCS development: including resolution of such issues as the need for marine terminals and onshore processing facilities within the coastal zone.

The numerous "direct effects" of Lease Sale 53 were described at length by the District Court (DOI Pet. at 62a-65a) and will not be repeated here. It should be noted however that the "direct effects" are particularly significant on the facts of this case, where the OCS tracts at issue commence at the three-mile limit and are thus immediately adjacent to the very coastal zone resources Congress sought to protect by virtue of the CZMA.

Indeed, based on recent developments, DOI must concede as much. Lease Sale 73, which is scheduled for November 1983, is located off the Central California coast in the same area as the tracts at issue in this case. In fact, the Lease Sale 73 tracts being offered *surround* the Lease Sale 53 tracts at issue here. Because DOI has already prepared a

⁸⁰As previously discussed (p. 20, n. 34), even under petitioners' "intervening cause" test, it would be clear that Lease Sale 53 directly affects the coastal zone. As the District Court observed, DOI "reasonably anticipates" the coastal zone effects of OCS development when it issues the leases, and the federal approvals at subsequent stages cannot, by any stretch of the imagination, be found to "destroy the causal connection between the act [DOI's leasing] and the effect." DOI Pet. at 60a, n. 16

consistency determination for Lease Sale 73,⁸¹ the agency has at last demonstrated beyond dispute what California has contended throughout this litigation: that is, if the correct definition of the "directly affecting" threshold test is applied, there can be no doubt that Lease Sale 53 requires a consistency determination.

CONCLUSION.

The Ninth Circuit judgment that Lease Sale 53 "directly affects" the coastal zone and requires a consistency determination should be upheld.

Respectfully submitted,

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⁸¹By letter of June 30, 1983, DOI transmitted to the California Coastal Commission a "Determination of Whether Outer Continental Shelf Lease 73 is Consistent to the Maximum Extent Practicable With the California Coastal Management Program." In this document, DOI analyzed whether the lease sale is consistent with some sixteen different policies of the California Coastal Zone Management Program. In its response, the state may indicate that additional policies are involved. WOGA's suggestion that consistency will turn on only one policy of the Program is a gross simplification. WOGA Br. p. 8.

It should also be noted that of the 29 tracts at issue here, 10 were not bid upon at Sale 53. (The District Court's injunction permitted bids to be received but not accepted.) DOI has included these 10 Lease Sale 53 tracts in its proposed Notice of Sale for Lease Sale 73 and has stated that it is considering leasing these tracts as part of Lease Sale 73. "Special Report by the Federal Defendants Concerning Status of These Cases," filed in *California v. Watt*, Nos. CV-81-2080, CV-81-2081 (C.D. Cal. July 26, 1983).

Nos. 82-1326 and 82-1327

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BRIEF OF RESPONDENTS COUNTY OF HUMBOLDT, ET AL.

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QUESTION PRESENTED

Whether the lower courts properly determined that Outer Continental Shelf Lease Sale 53, which established the basic scope and charter for subsequent oil and gas development in an area adjacent to the California coastal zone, is a federal activity "directly affecting" that zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when that determination was based upon the purposes of the CZMA, Congress' understanding of the meaning of "directly affecting" and the statements of Congress in the legislative history of the Act that it intended this provision to apply to OCS leasing, and the interpretation by the federal agency charged with administering the Act.

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**BRIEF OF RESPONDENTS
COUNTY OF HUMBOLDT, ET AL.**

STATEMENT OF THE CASE

The decisions of the courts below require that the Secretary of the Interior conduct an outer continental shelf ("OCS") oil and gas lease sale, designated as Lease Sale 53, "in a manner which is to the maximum extent practicable, consistent" with California's federally approved coastal management program, pursuant to Section 307 (c)(1) of the Coastal Zone Management Act of 1972 ("CZMA"), 16 U.S.C. § 1456(c)(1). Respondents Humboldt County *et al.* (hereinafter "Local Governments") support the affirmance of the decisions below because of their stake in the effectiveness of California's coastal management program in addressing the impacts of OCS leasing and development upon California's coastal zone.¹

Respondents Local Governments are comprised of 24 cities, counties and regional agencies with jurisdiction over portions of the coastal zone in California. The CZMA contemplates that Local Governments will take an active role in the planning, implementation and decisionmaking with respect to activities and programs that affect their portions of the State's coastal zone. *See, e.g.*, 16 U.S.C. § 1452(2) (H)

¹ These respondents accept as substantially accurate the statement of the case contained in the Brief for Petitioners Watt *et al.* ("DOI Br.") when supplemented by the statement contained in the Brief for the Cross-Petitioners and the additional matters set forth herein.

For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Petition for Writ of Certiorari of the Secretary of the Interior, *et al.*, are cited as "DOI Pet. at" All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at . . . a." References to the Brief of Petitioners Western Oil and Gas Association, *et al.*, ("WOGA") are cited as "WOGA Br. at" Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, *e.g.*, "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23." Documents from the Joint Appendix are similarly cited, with the abbreviation "J.A." replacing "C.R."

(local government participation in decisionmaking); § 1454 (g) (allocation of funds to local governments); § 1455(c) (2)(B) (mechanisms for continuing participation of local governments in coastal management programs); and § 1456a(a)(1) (funding assistance for local governments under coastal energy impact program).

Under California's federally approved coastal management program, Local Governments have a major role in dealing with OCS development matters, such as the location of onshore support facilities, crude oil treatment and processing systems, oil and gas transportation alternatives, oil spill containment programs and other resource management concerns related to such energy development. *See American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 922-926 (C.D. Cal. 1978), *aff'd*, 609 F. 2d 1306 (9th Cir. 1979).

The impacts of OCS development are of particular concern to Local Governments because of the scale and pace of OCS development off the California coast. A total of 239 leases have been awarded in federal areas in proximity to the California coastal zone.² Offshore of Santa Barbara County alone, federal oil and gas leases have been granted on 68 tracts in the Santa Barbara Channel, 51 tracts north of Point Conception and on additional tracts south of the Channel Islands—in addition to the state oil and gas leases on 30 tidelands parcels. Onshore support facilities for OCS development currently include twelve separation and treatment facilities in Santa Barbara and Ventura Counties and ten marine terminals located in those two counties and in San Luis Obispo County.³ Not only have five of the six Pacific OCS sales to date taken place off the California coast but the current federal Five

²Minerals Management Service, Department of the Interior, *Pacific Summary Report* 28 (1982).

³*Pacific Summary Report*, *supra* note 2, at 56.

Year Leasing Plan shows one California lease sale per year for the period 1983-1986.⁴

The amount and location of current and proposed OCS development have created complex management issues that must be addressed by Local Governments as well as the State. The application of Section 307(c)(1) to the OCS lease sale stage, under the provisions of the CZMA, is, in the view of Local Governments, vital to their ability to manage, in cooperation with both the state and federal governments, the direct effects on the coastal zone of this accelerated OCS leasing.⁵

SUMMARY OF ARGUMENT

I. In passing the CZMA, Congress declared that there was a "national interest" in the effective management of the coastal zone. Through federally funded and approved coastal management programs, prepared by the states with the participation of federal agencies, it established the mechanism for balancing conflicts such as those between coastal zone protection and the development of energy resources on the OCS. Moreover, Congress recognized that these management programs would be ineffective in protecting the national interest in the coastal zone if they applied only to the actions of state and local governments, and it accordingly required in Section 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1), that all federal activities "directly affecting" the coastal zone be conducted "to the maximum extent practicable, consistent" with federally approved coastal management programs. In this regard, the coastal impact of OCS development was one of Congress' principal concerns in enacting the CZMA, and the legislative history of the Act contains unequivocal statements of Congress' intent that Section 307(c)(1) apply to OCS leasing.

⁴*Pacific Summary Report*, *supra* note 2, at 45.

⁵See discussion *infra* at 38-41.

Petitioners take a different view of the national interest. To them, the "national interest" lies singularly in "OCS resource development" (DOI Br. at 48), and they purport to find its confirmation not in the statute under review but in another statute, the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331 *et seq.* Although they can point to no specific conflict between any particular directives in the two statutes—and, indeed, acknowledge that the Secretary of the Interior is currently complying with both (DOI Pet. at 19 n. 18)—they nevertheless argue that the lower courts' interpretation of Section 307(c)(1) will undermine the overriding commitment to OCS development which they discern in OCSLA and the procedures established therein for achieving this commitment. DOI Br. at 27-29; WOGA Br. at 21-31. They reach this conclusion by characterizing the application of consistency review to OCS leasing as a potential state "veto" of OCS development. DOI Br. at 26.

However, there is nothing in the text or legislative history of OCSLA or in any canon of statutory construction which suggests that OCSLA provides more definitive guidance for the interpretation of Section 307(c)(1) of the CZMA than does the CZMA itself or its legislative history. Petitioners' argument ignores the "national interest" in coastal zone management reflected in the CZMA, and misconceives the role of the coastal management program and consistency review in fulfilling that interest. Contrary to petitioners' assertions, the lower courts' interpretation of Section 307(c)(1) does not provide the states with any "veto" and does not detract from any paramount rights of the United States in the OCS. It requires only that the Secretary of the Interior comply "to the maximum extent practicable" with the body of law which Congress has determined should be applied to OCS leasing—the coastal management program.

II. The lower courts properly construed the phrase "directly affecting" in Section 307(c)(1) by employing the

tests for the application of this provision which Congress itself formulated in the legislative history of the Act. They properly determined that there was a "functional interrelationship" between OCS leasing and the administration of the coastal zone and that OCS leasing initiated "a series of events which have consequences in the coastal zone." DOI Pet. at 13a, 51a. In place of the language of Section 307(c)(1) and Congress' elaboration of its meaning, petitioners seek to substitute other definitions of their own making on the supposition that the phrase "directly affecting" has one and only one "plain meaning." There is, however, nothing in the lower courts' interpretation of that phrase which departs from any "plain meaning" that it has, and surely nothing which requires that such interpretation be made without regard to the legislative history or purpose of the provision in question, as petitioners contend. Their efforts to demean the significance of OCS leases contradict Congress' own understanding of those instruments as authorizations for OCS development.

III. Petitioners also argue that it is meaningless to render a consistency determination at the stage of OCS leasing because of a host of "uncertainties" and the impossibility of issuing a "guarantee" that all hypothetical future activities will be consistent with a state's coastal management program. What petitioners ignore is that there are vital determinations that can be made only at the lease sale stage. The selection or deletion of tracts for leasing and the establishment of stipulations as the terms of the lease "establish the basic scope and character for subsequent development and production." DOI Pet. at 13a. If the consistency review procedures as established by Section 307 of the CZMA are deferred to a later time when individual exploration or development plans are submitted on a tract-by-tract basis, the opportunity to apply the broader concerns of the coastal management

program will be foregone entirely. Moreover, the "federal activity" in the OCS process—the *leasing* of the OCS—will never be subjected to consistency review by the federal government. Finally, there is no requirement that the Secretary of the Interior issue impossible "guarantees" in the consistency review process, as applied to OCS leasing. Again, petitioners obscure the important decisions that are made at the lease sale stage and overstate the obligations imposed by consistency review, as the essential premises of their argument.

IV. Petitioners also invite this Court to discard the consistency review process because of their apprehensions that its application to OCS leasing will breed incessant litigation, thwart OCS development and jeopardize the federal-state cooperation in the development of management programs. Based on the experience so far, petitioners' apprehensions appear misplaced. The early application of consistency to OCS leasing will in many instances reduce rather than aggravate conflicts between the competing interests of coastal protection and OCS development. Otherwise, states will be relegated to an essentially defensive or reactive posture in reviewing exploration and development plans submitted individually. More importantly, Congress has decreed that consistency is the prescribed vehicle for ensuring that the national interest in the management of the coastal zone is secured, and the "policy considerations" which petitioners advance provide no basis for a judgment by this Court to the contrary.

ARGUMENT

I. PETITIONERS' ARGUMENTS FAIL TO TAKE INTO ACCOUNT THAT CALIFORNIA'S COASTAL MANAGEMENT PROGRAM IS A FEDERALLY FUNDED AND APPROVED VEHICLE FOR THE PROTECTION OF THE "NATIONAL INTEREST" IN THE COASTAL ZONE AND DOES NOT CONSTITUTE A "STATE VETO" OF FEDERAL ACTIVITIES.

The Solicitor General seeks to dramatize the issue in this case by implying that it pits "the national interest in OCS resource development" against "California's interest in the preservation of its coastal zone." DOI Br. at 48. He asserts, moreover, that the decisions of the lower courts have armed the states with a potent "veto" over OCS development (*id.* at 26), which may be used to defeat this "national interest." What these characterizations fundamentally ignore, however, is that California's coastal management program is not merely a "state law" (*id.* at 13) or a "state administrative process" (WOGA Br. at 3) but a federally funded and approved management program intended by Congress to serve as the vehicle for the protection of a clearly defined "national interest" in the coastal zone.

In passing the CZMA, Congress recognized that coastal management programs could not fulfill this important national objective if they applied only to the actions of state and local governments. Accordingly, in Section 307(c) of the CZMA, 16 U.S.C. § 1456(c), Congress required that the activities of federal agencies "directly affecting" the coastal zone, their development projects "in" the coastal zone, and certain licenses and permits issued by them, be "consistent" with a federally approved coastal management program.

The application of this consistency review to OCS leasing under Section 307(c)(1) does not, however, provide the states with a "veto" over OCS development, as petitioners assert, but rather requires the Secretary of the Interior to ensure that OCS leases are consistent, to the maximum

extent practicable, with the substantive body of law contained in the management program. Thus, petitioners' arguments are premised upon fundamental misconceptions of both the purpose and effect of the federal statute under review, the Coastal Zone Management Act.

A. Congress Has Determined that There is a "National Interest" in the Management of the Coastal Zone.

However narrowly petitioners conceive the "national interest," Congress determined, as the first premise for its enactment of the CZMA in 1972, that "[t]here is a *national interest* in the effective management, beneficial use, protection and development of the coastal zone." 16 U.S.C. § 1451 (a) (emphasis added). It further declared that it is "the *national policy* . . . to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations," and to encourage federal, state and local governments to cooperate in developing and implementing coastal management programs for this purpose. 16 U.S.C. § 1452 (emphasis added).⁶

From the outset, Congress included development of the Outer Continental Shelf among the matters it expected to be addressed by coastal management under the CZMA. For example, Congress recognized that energy demands on the OCS "are placing stress on these areas and are creating the need for resolution of serious conflicts among important and competing uses and values in coastal and ocean waters." 16 U.S.C. § 1451(f). It specifically included the "extraction of mineral resources and fossil fuels," among the developments which it found had "resulted in the loss of living marine resources, wildlife, nutrient-rich areas, per-

⁶The legislative history of the 1972 Act contains pervasive evidence of the broad conception held by Congress of "the national interest" in protection of the coastal zone and its effective management through coastal management programs. See, e.g., S. Rep. No. 753, 92d Cong., 2d Sess. 1-7 (1972); H.R. Rep. No. 1049, 92d Cong., 2d Sess. 9-11 (1972).

manent and adverse changes to ecological systems. . . ." 16 U.S.C. § 1451(c).⁷

In the 1976 Amendments to the CZMA, Congress underscored its original intent that coastal zone management provide the principal means for resolving the conflicts between the accelerated pace of OCS development and other energy facility siting, and the protection of the coastal zone. Thus, it amended the findings in Section 302 to add a reference to the "national objective of attaining a greater degree of energy self-sufficiency" (16 U.S.C. § 1451(j)); it included a specific reference to "energy facilities" as part of the "national interest" which must be given adequate consideration in coastal management programs (16 U.S.C. § 1455(c) (8)); and it required that coastal management programs include a planning process for "energy facilities likely to be located in, or *which may significantly affect, the coastal zone*" (16 U.S.C. § 1454(b) (8) (emphasis added)).⁸

⁷Congress clearly did not intend that all future development thus affecting the coastal zone be forestalled but rather that it be effectively "managed" so that the national interest in both protection and development of the coastal zone could be achieved. In Congressional hearings preceding the Act's passage, Administration spokespersons, such as Dr. Robert White, the Administrator of the National Oceanic and Atmospheric Administration, emphasized the need for this management approach:

"The coastal zone is a unique area. Rational management of activities therein is one of the more critical environmental problems facing our Nation. Much of the area is in a state of degradation and under severe competition for various types of economic development.

We feel that the answer here is not to stop development but to provide for orderly and rational utilization of this region."

Coastal Zone Management: Hearings on H.R. 2492, 2493 and 9229 Before the House Comm. on Merchant Marine and Fisheries, 92d Cong., 1st Sess. 273 (1971). See also S.Rep. No. 753, 92d Cong., 2d Sess. 6 (1972) ("The key to more effective use of the coastal zone in the future is introduction of management systems permitting conscious and informed choices among the alternatives").

⁸"Energy facilities" were defined to include "oil and gas facilities, including platforms, assembly plants, storage depots, tank farms,

At the same time, Congress left intact its earlier finding that there was "national interest" in coastal protection. It further required that coastal management programs protect "coastal resources of *national significance*" (16 U.S.C. § 1455(i) (emphasis added)), which were defined to include "any coastal wetland, beach, dune, barrier island, reef, estuary or fish and wildlife habitat, if any such area is determined by a coastal state to be of substantial biological or natural storm protective value" (16 U.S.C. § 1453(2)).⁹

The gist of the 1976 Amendments was simply a reaffirmation of Congress' determination that the balancing of these competing demands upon the coastal zone be done through coastal management programs. The Conference Report on the 1976 Amendments confirms this approach:

"The conferees believe . . . that the coastal states and localities, which are closer to and more cognizant of the situation, should make the basic decisions as to the particular needs which result from such new or expanded energy activity; and . . . that the discretion of the Secretary of Commerce and other Federal officials should be correspondingly limited." Conference

crew and supply bases, . . . refining complexes . . . facilities including deepwater ports, for the transfer of petroleum . . . [and] pipelines. . . ." 16 U.S.C. § 1453(6).

"Throughout its deliberation over the CZMA, Congress has recognized that the cumulative destruction from year to year of such "local" resources as a wetland, a beach or an estuary was resulting in the loss of "coastal resources of national significance." See, e.g., H.R. Rep. No. 1012, 96th Cong., 2d Sess. 2 (1980) ("we have damaged or destroyed over forty percent of our wetlands, and we continue to do so at a rate of 300,000 acres per year"). It was the sum total of these losses of "local" resources that occasioned the passage of the CZMA in the first instance and that has been the central concern of Congress in amending and reauthorizing it. In this respect, petitioners fundamentally misconceive the "national interest" when they imply that it is only "*California's interest* in the preservation of its coastal zone" (DOI Br. at 48, emphasis added) which would be served by the application of its management program to Lease Sale 53.

Report, H.R. Rep. No. 1298, 94th Cong., 2d Sess. 24 (1976) (emphasis added).¹⁰

Finally, in 1980, when Congress reauthorized the CZMA for another 5 years, it stressed once again the fundamental national value of the coastal protection mechanisms established by the Act:

"It is this rational balancing of competing pressures on finite coastal resources which was intended by the 1972 act and it is the growing awareness that such balancing will be increasingly difficult in the years ahead that argues strenuously for the authorization of, and the improvements made to, the CZMA contained in H.R. 6979." H.R. Rep. No. 1012, 96th Cong., 2d Sess. 33 (1980).

The sole vehicle for ensuring that this sort of "balancing" takes place in the formulation and proposal of federal activities directly affecting the coastal zone is the "consistency" review process established by Section 307(c)(1) of the CZMA.

B. The Requirement of Consistency with the Management Program is Crucial to the Implementation of This National Interest.

The linchpin of the cooperative scheme envisioned by Congress in the CZMA is the coastal management pro-

¹⁰See also 121 Cong. Rec. 23,055 (1975) (statement of Senator Stevens), 23,081 (Senator Muskie), 23,082 (Senator Kennedy), 23,083 (Senator Pell). Senator Williams, for example, stated:

"Proposals are being made for a deep-water port, oil drilling and floating nuclear powerplants off our shore, and the only protection our precious coastal resource has is the Coastal Zone Management Act of 1972. This act was created to assist the States in developing adequate controls to prevent damage to the adjacent land and to preserve the fragile ecological balance in coastal areas." *Id.* at 23,084.

The debate in the House was replete with statements by the Representatives to this same effect. See, e.g., 122 Cong. Rec. 6,113 (1976) (statement of Rep. Mosher); 6,113-114 (Rep. Lent); 6,117 (Rep. Forsythe); 6,121 (Rep. Daniels); 6,122 (Rep. Drinan); *id.* (Rep. Ruppe).

gram.¹¹ Congress authorized federal funding for the development and administration of the programs, and required that they be submitted for federal approval by the Secretary of Commerce under detailed criteria set forth in the Act.¹² The Act also requires that federal agencies participate extensively in the development of the management programs, and that state agencies adequately consider the views of federal agencies in program development.¹³

¹¹A "management program" was defined by Congress to include "a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the state in accordance with the provisions of this chapter, setting forth objectives, policies, and standards to guide public and private use of lands and waters in the coastal zone." 16 U.S.C. § 1453(12).

¹²Congress has authorized federal grants covering eighty percent of the costs of developing management programs, for each coastal state which demonstrates that the funds will be used to develop a management program consistent with particular criteria set forth in the Act. 16 U.S.C. § 1454. The Act in turn contains detailed requirements which relate to both the process for development of the program and its content. 16 U.S.C. § 1454. Programs which are federally approved qualify for federal funding of eighty percent of their administration costs. 16 U.S.C. § 1455. It should be noted that the Secretary of Commerce has delegated his responsibility under the CZMA to the National Oceanic and Atmospheric Administration ("NOAA").

¹³Congress has specifically declared it national policy "to encourage the participation and cooperation of . . . Federal agencies having programs affecting the coastal zone, in carrying out the purposes of this chapter." 16 U.S.C. § 1452. Thus, federal funds could not be made available for either development or administration of the program—nor could NOAA approve a program—unless it had been developed and adopted "with the opportunity of full participation by relevant federal agencies," among others. 16 U.S.C. § 1455(c)(1); *see also* 16 U.S.C. § 1456(b) (prohibiting the approval of a management program "unless the views of Federal agencies principally affected by such program have been adequately considered"). Any "serious disagreement between any federal agency and a coastal state in the development . . . of a management program" is required to be resolved by mediation. 16 U.S.C. § 1456(h).

Congress would not have required this participation by federal agencies in the development of a management program unless it expected that their activities would in fact be affected by that program. Accordingly, in Section 307(c) of the CZMA, 16 U.S.C. § 1456(c), Congress provided that various activities, development projects, permits and licenses under the jurisdiction of federal agencies be "consistent" with approved coastal management programs. Correspondingly, Congress has recognized that the requirement of consistency represents the "single greatest incentive for State participation in the coastal zone management program." S.Rep. No. 277, 94th Cong., 1st Sess. 9 (1975). As the Ninth Circuit observed, "[a] *quid pro quo* for the state's development of such a plan is that certain federal activities will be conducted consistently with the state's plan." DOI Pet. at 14a.

It would be anomalous indeed if the federal activity which has the most significant impact upon the coastal zone—oil and gas leasing on the OCS—were not subject to this requirement of consistency. In fact, the legislative history of the subsequent amendments and reauthorization of the Act in 1976 and 1980 reflects Congress' understanding that consistency review of OCS leasing is required under Section 307(c)(1) of the CZMA.¹⁴ Thus, in the present case, the erroneous determination by the Secretary of the Interior that Lease Sale 53 does not directly affect the coastal zone and his consequent refusal to make the consistency determination required by the CZMA, means

¹⁴S. Rep. No. 277, 94th Cong., 1st Sess. 3 (1975) (the lack of coordination between coastal states and federal agencies prior to OCS leases could be resolved by "[f]ull implementation of the Coastal Zone Management Act of 1972"); *id.* at 37; S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) ("[t]he Department of Interior's activities which preceded lease sales were to remain subject to the requirements of Section 307(c)(1)"); H.R. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980) (referring to "Federal agency responsibility to provide states with a consistency determination related to OCS decisions which preceded issuance of leases"). See also note 49 *infra*.

that an entire body of law that Congress intended be applicable to such federal activities—namely, the coastal management program—has never even been considered or applied by the Secretary.¹³

C. California's Management Program Was Reviewed and Commented Upon by Affected Federal Agencies, Approved by NOAA and Upheld in the Courts as Meeting The Criteria of the CZMA.

Although Congress intended that management programs meeting the criteria in the CZMA would apply to federal activities directly affecting the coastal zone, petitioner WOGA advances certain "policy considerations" for dispensing with their application to OCS leasing. WOGA Br. at 44. WOGA decries "the vague and general policies set forth in state CZMA programs" (*id.* at 45), it purports to critique California's management program

¹³In all of the respects enumerated above, the consistency review process provided by the CZMA is fundamentally different in purpose and effect from procedures under the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* Section 19(a) of OCSLA, 43 U.S.C. § 1345(a)—so heavily relied upon by petitioners—clearly provides states with an opportunity to participate in policy and planning decisions relating to management of the resources of the OCS, by permitting governors to submit "recommendations" to the Secretary regarding the "size, timing, or location" of OCS lease sales. *See* WOGA Br. at 24-25. However, in contrast to the requirements of the CZMA, OCSLA does not require that these recommendations be based on any coastal planning process, does not provide any federal funds for the development of these recommendations and does not require that they consider the views of federal agencies. Moreover, under OCSLA, these recommendations may be entirely *ad hoc*, directed to a single federal activity, and they need not be accepted by the Secretary of the Interior unless they take proper account, in his view, of a reasonable balance between the national interest and the state's interest. 43 U.S.C. § 1345(c). Finally, these "recommendations" can be made by any affected state. In contrast, the "consistency" review process under the CZMA is applicable only to states with federally approved management programs.

(*id.* at 6-10), and it invites this court to "extract" OCS leasing from this "morass" (*id.* at 45). However, these same arguments have already been rejected by NOAA and the federal courts in reviewing WOGA's prior challenge to federal approval of the California management program, and the only forum appropriate for further consideration of these "policy considerations" is Congress, not this Court.

In November 1977, the Secretary of Commerce approved the California Coastal Management Program. In so doing, he found that "the views of Federal agencies principally affected" by the program had been adequately considered. Approval of the California Coastal Management Program at 26 (Nov. 7, 1977) (citing 16 U.S.C. § 1456(b)). He further found that:

"The management program provides for 'adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature.'" *Id.* at 18 (quoting 16 U.S.C. § 1455(c)(8)).

WOGA and the American Petroleum Institute sued to block approval of the California management program. *American Petroleum Institute v. Knecht*, 465 F.Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979). Their suit was brought out of a purported concern that OCS development would be thwarted by the requirement of consistency with the state's management program. 456 F.Supp. at 922. They asserted that the management program had failed to consider adequately the views of affected federal agencies and the national interest involved in planning for and siting energy facilities, and that it was overly general. 456 F.Supp. at 920-922, 926. However, the District Court and the Ninth Circuit both rejected these claims, and all others that the plaintiffs advanced, and they found that the program did provide for adequate consideration of federal agencies' views and

the national interest. 456 F.Supp. at 889, 922-927; 609 F.2d at 1306, 1313-1315.¹⁶

Moreover, to suggest, as petitioners do, that this Court may determine under the guise of statutory construction that it is not feasible to apply a coastal management program to a federal activity like OCS leasing would require this Court to substitute its judgment for that of Congress in enacting Section 307(c)(1) of the CZMA.¹⁷ They also ignore the fact that the CZMA, as applied by the lower courts, typifies the approach Congress has taken in recent times in addressing national environmental or resource problems. In a number of contexts Congress has sought to serve national objectives or interests through the encouragement and funding of plans developed by states, in cooperation with federal authorities and under federal criteria, that deal with particular environmental or resource problems.¹⁸ Indeed, in any number of instances

¹⁶WOGA argues that this decision was the product of "a restrictive standard of judicial review" (WOGA Br. at 6), and liberally quotes certain wry political observations made by the District Court concerning the CZMA in *American Petroleum Institute v. Knecht* (*id.* at 6-7, 45). However, the fact remains that the District Court painstakingly reviewed the California management program in a 43 page opinion and determined that it "takes an approach which has received the congressional blessing." 456 F.Supp. at 926. Moreover, with respect to WOGA's arguments that the program was too general, the District Court pointedly stated that "[t]o the extent plaintiffs seek not guidance with respect to the way in which coastal resources will be managed but instead a 'zoning map' which would implicitly avoid the need to consult with the state regarding planned activities in or affecting its coastal zone, the Court rejects their position." *Id.*

¹⁷See *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 194-195 (1978).

¹⁸See, e.g., Clean Air Act, § 110, 42 U.S.C. § 7410 (Supp. V 1981) (providing for state implementation plans for national primary and secondary air quality standards); Resource Conservation and Recovery Act § 3006, 42 U.S.C. § 6926 (1976 & Supp. V 1981) (authorizing state programs to regulate the treatment, storage, transportation and disposal of hazardous waste, a problem Congress found to be national in scope); Safe Drinking Water Act § 1413, 42

Congress has required that federal facilities or land—like federal leasing of the Outer Continental Shelf—be subject to the requirements of state plans developed to serve these kinds of objectives.¹⁹ The application of coastal management programs to OCS leasing thus serves the “national interest” by a means which Congress has deemed feasible in the CZMA and in numerous other enactments.

D. Petitioners Mischaracterize the Effect of the Consistency Review Process as Applied to OCS Leasing in the Decisions of the Lower Courts.

While according little attention to Congress' concern for the “national interest” in the coastal zone reflected in the CZMA, petitioners on the other hand greatly exaggerate the impact of the application of coastal management programs to OCS leasing. For example, the Solicitor General argues that the lower courts' construction of Section 307(c)(1) “gives California a potential veto over a broad range of federal activities on the OCS not previously considered to be within the reach of state control.”

U.S.C. § 300g-2 (1976) (authorizing state programs to enforce national drinking water regulations); Surface Mining Control and Reclamation Act § 503, 30 U.S.C. § 1253 (Supp. V 1981) (allowing for state program of enforcement of national standards for surface coal mining and reclamation); Federal Water Pollution Control Act § 402, 33 U.S.C. § 1342(b) (Supp. V 1981) (allowing states to establish their own permit programs to regulate discharges in order to effect federal effluent limitations).

¹⁹All of the federal legislation cited in the preceding footnote provides that federal facilities and activities will be subject to state control. *See, e.g.*, Clean Air Act § 118, 42 U.S.C. § 7418 (Supp. V 1981); Resource Conservation and Recovery Act § 6001, 42 U.S.C. § 6961 (1976 & Supp. V 1981); Safe Drinking Water Act § 1447, 42 U.S.C. § 300j-6(a) (Supp. V 1981); Surface Mining Control and Reclamation Act § 523, 30 U.S.C. § 1273 (providing that the requirements of an approved state program must be incorporated in any federal mineral lease for surface coal mining as well as allowing state regulation of surface coal mining on federal lands); Federal Water Pollution Control Act § 313, 33 U.S.C. § 1323 (Supp. V 1981). In *Hancock v. Train*, 426 U.S. 167 (1976) and *EPA v. California ex rel State Water Resources Control Board*, 426 U.S. 200 (1976), this

DOI Br. at 26. However, the Ninth Circuit took pains in its opinion to dispel any notion that its holding implied that states possessed a "conclusive" or "final veto power" over OCS oil and gas development. DOI Pet at 20a-21a. Indeed, respondents, plaintiffs below, did not argue—and do not argue now—that Section 307(c)(1) grants states any unilateral authority to "veto" particular lease sales—much less any "conclusive" or "final" veto authority.²⁰

While the activities of the Secretary of the Interior which directly affect the coastal zone of a state must be consistent "to the maximum extent practicable" with the state's management program, it is the Secretary and not the state who makes that determination of consistency. In that sense, Congress has decreed that once a state's management program has been approved by NOAA as satisfying the criteria of the CZMA, that management program becomes the body of substantive law which thereafter

Court held that the substantive provisions of state plans developed under the Clean Air Act and Federal Water Pollution Control Act respectively, were applicable to federal facilities, but that state permit requirements were not applicable. Following these two decisions, Congress amended both laws to make clear that state permit requirements also applied to federal facilities. *See* Conference Report, H.R. Rep. No. 506, 95th Cong., 1st Sess. 12 (1977); Conference Report, H.R. Rep. No. 830, 95th Cong., 1st Sess. 93 (1977).

²⁰If the Ninth Circuit had confined its opinion to this clarification, respondents would have no quarrel with it. However, the Ninth Circuit not only concluded that the final determination of consistency under § 307(c)(1) rests with the Secretary of the Interior, but also impliedly suggested that the Secretary has discretion to avoid consistency with the state's management program on the basis that OCS activity "would be hampered or proscribed by conformity" with it or apparently on the basis of his views of the "the reasonableness of the state plan." DOI Pet. at 22a. But the fact that it is the Secretary who determines consistency does not mean that he has this kind of broad discretion to act "inconsistently" with the state plan. Respondents submit that the Ninth Circuit's reading of the "maximum extent practicable" language may render the requirement of "consistency" largely nugatory and is entirely unwarranted. We have argued in the Brief in Support of the Cross-Petition that this portion of the Ninth Circuit's opinion was unripe for decision.

confines the Secretary's discretion in OCS leasing—but it has not provided the states in Section 307(c)(1) with anything akin to a “veto.” Such a veto would exist only if Congress had provided the states in Section 307(c)(1) with final authority to determine the consistency of the federal activity. Instead, Congress chose to repose the authority to make this determination in the federal agency conducting the activity.²¹

On the other hand respondents submit that the federal agency making this consistency determination is not entitled to disregard the state's views on whether the federal activity is consistent. Presumably the federal agency must accord substantial deference to the interpretation of that

²¹In contrast, under § 307(c)(3), 16 U.S.C. § 1456(c)(3), which applies to federal permits or licenses, it is the state—not the federal permitting agency—which determines consistency, and a state's determination of inconsistency expressly bars the federal agency from issuing the permit. Congress decided that it would not give a state a “final veto” even in § 307(c)(3), however, but would provide for a federal override of a state's management program, as applied to federal permits or licenses, whenever the Secretary of Commerce determines that such an override would be consistent with the purposes of the CZMA, or in the interests of national security. 16 U.S.C. § 1456(c)(3)(A). It is noteworthy that Congress did not vest that override in the federal permitting agency but in the Secretary of Commerce, as an independent federal agency charged with overall implementation of the CZMA.

It is also significant that Congress originally considered proposals for a federal override of a state's management program under Section 307(c)(1). S.Rep. No. 753, 92d Cong., 2d Sess. 54 (1972). However, it ultimately rejected inclusion of any such override in Section 307(c)(1). See Conference Report, H.R. Rep. No. 1544, 92d Cong., 2d Sess. 7 (1972); H.R. Rep. No. 1049, 92d Cong., 2d Sess. 5 (1972). Apparently, Congress concluded that the balance of federal-state relationships was properly struck there by vesting the *determination* of consistency with the federal agency and not the state, and providing that consistency must be preserved “to the maximum extent practicable.” With this protection in place against any possibility of a *state's* abuse of the consistency provision, Congress did not believe it was appropriate to allow the federal agency to “override” the state's management program.

management program by the state agency responsible for its formulation and implementation.²² Again, however, the states have not been granted any veto.

E. Given the "National Interest" which Congress Sought to Protect Through Coastal Management Programs, it is Clear that Section 307(c) (1) Does Not Detract From Any "Paramount Rights" that the United States Has in the OCS.

The upshot of petitioners' disenchantment with the coastal management scheme established by the CZMA is their request that its application to OCS leasing and development be determined largely by reference to another statute, the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331 *et seq.* See, e.g., DOI Br. at 27-35; WOGA Br. at 21-32. They assert that any other approach risks subversion of Congress' intent in OCSLA to preserve the federal government's "paramount rights" over the OCS. DOI Br. at 26; WOGA Br. at 18-19. However, petitioners cannot identify any *conflict* between any particular directives in the two statutes. Moreover, their argument again fails to take into account the national interest that Congress sought to protect in the coastal zone and the nature of the system of federal-state coordination that Congress established in the CZMA to serve that interest. When the CZMA is properly understood, nothing in it or in the lower courts' interpretation of it detracts from the federal government's "paramount rights" in the OCS.

WOGA's argument is particularly far removed from any inquiry into the purposes of the CZMA. Rather, it proceeds from the assumption that the principal question before the Court is whether the application of consistency review at the OCS leasing stage would "undermine" the

²²Indeed, the regulations promulgated by NOAA contemplate a substantial interplay between the federal and state agencies, in resolving any disputes over whether particular federal activities are consistent. See 15 C.F.R. §§ 930.41, .42, comments; 44 Fed. Reg. 37149 (1979).

compromise reached in 1953 over ownership of the tidelands as between the state and federal governments. WOGA Br. at 17. Accordingly, it asks this Court to treat as automatically suspect any interpretation of the CZMA which would "give the states any measure of authority over OCS leasing." *Id.* at 18. However, as WOGA acknowledges, the 1953 Compromise to which it refers, dealt with the question of federal versus state *ownership* of the OCS. *Id.* at 17, 18.

Congress did not purport in that context to limit its own prerogative to take further action to ensure that development of the OCS would be conducted in harmony with other national concerns. That Congress thereafter determined that protection of the coastal zone was in the national interest and chose a vehicle for effective management of the coastal zone—federally funded and approved management programs that require federal determinations of consistency—in no way detracts from the United States' "paramount rights" in the OCS.

Respondents submit, moreover, that the fundamental question of statutory interpretation of the CZMA posed in this case must be answered principally by reference to the objectives which Congress sought to achieve by *that legislation*. Petitioners' suggestion that OCSLA, which deals only with development of the OCS, "should be given initial scrutiny" (WOGA Br. at 21) in interpreting the language of Section 307(c)(1) of the CZMA, which applies generally to all federal agencies, is clearly misplaced. In *Chemical Manufacturers' Ass'n v. Environmental Protection Agency*, 673 F.2d 507, 512 (D.C. Cir. 1982), the court rejected a similar argument that one federal statute should "be given precedence over" another. As the court stated:

"When forced to choose which of two contradictory statutes to enforce, courts may decide that the more specific statute is an exception to the more general one. But if the statutes do not contradict one another

no choice need be made. . . . [R]egulatory overlap is not the same as a situation where two statutes provide mutually exclusive results when applied to the same facts." 673 F.2d at 512.

See also *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The court in *Chemical Manufacturers' Ass'n* also emphasized that the two statutes were intended to serve different objectives. 673 F.2d at 512.

In the present case, petitioners can point to no instance where compliance with both OCSLA and Section 307(c)(1) of the CZMA leads to "mutually exclusive results,"²³ and as discussed *infra* at 41-42, the two statutes are designed to foster different national objectives. When the statutory language of the CZMA at issue herein is examined in light of that statute's objectives, it is clear, as the lower courts discerned, that OCS leasing is subject to the consistency review requirement of Section 307(c)(1).²⁴

II. THE LOWER COURTS PROPERLY CONSTRUED THE PHRASE "DIRECTLY AFFECTING" IN SECTION 307(c)(1).

The lower courts determined that Lease Sale 53 was a federal activity "directly affecting" the California coastal zone and that Interior was accordingly required to determine the consistency of Lease Sale 53 with the Cali-

²³That there is no such conflict between the two statutes is perhaps most evident from the fact that the Secretary of the Interior has been making consistency determinations under Section 307(c)(1) on all OCS leasing subsequent to the Ninth Circuit's decision herein. See DOI Pet. at 19 n. 18.

²⁴Moreover, since the lower courts' interpretation of Section 307(c)(1) does not in any way detract from the United States' "paramount rights" in the OCS, it cannot be said to *overturn* the kind of "consistent, established rule" for which this Court has required a "clear statement" from Congress. *Ruckelshaus v. Sierra Club*, 51 U.S.L.W. 5132 (July 1, 1983). In any event, as discussed *supra* at note 14, Congress has clearly stated its intent that Section 307(c)(1) apply to OCS leasing.

fornia coastal management program. Their construction of this broad phrase, "directly affecting," does not depart from any "plain meaning" it has. That construction is supported by the purpose and legislative history of the CZMA; it was previously adopted by NOAA, the agency charged with administering the CZMA; and it was recently reaffirmed by congressional statements on the subject.²⁵ Moreover, that construction is the only way in which the purposes of the CZMA can be achieved with respect to the important federal activity of OCS leasing.

It is surely no departure from any "plain meaning" of Section 307(c)(1) to say that the "direct effects" of a lease are the intended uses of the property leased—in this case oil and gas development on the Outer Continental Shelf. The Ninth Circuit thus correctly viewed Lease Sale 53 as "the first link in a chain of events" which thereafter includes the approval of exploration and development plans, the oil and gas development, and the consequent impacts upon a state's coastal zone. DOI Pet. at 13a.

Petitioners do not dispute that oil and gas development pursuant to an OCS lease may "directly affect" the coastal zone of a state. However, petitioners suggest that an OCS lease is of little or no significance in determining the impact on a state's coastal zone because intermediate federal approvals are required for exploration and development. Thus, the Solicitor General asserts that "a lease does not directly authorize the lessee to explore for, develop or produce oil or gas." DOI Br. at 29. However, Congress itself understood the practical significance of such a lease to be just the opposite. In OCSLA, it defined a "lease" as "any form of authorization which . . . *authorizes exploration for, and development and production of, minerals.*" 43 U.S.C. § 1331(c) (emphasis added).

²⁵In addition to the decisions under review, every other court which has construed this language so far has also reached the same conclusion. See *Conservation Law Foundation v. Watt*, 560 F.Supp. 561 (D. Mass. 1983); *Kean v. Watt*, 18 ERC 1921 (D.N.J. 1982); *California v. Watt*, 17 ERC 1711 (C.D. Cal. 1982).

If no OCS lease is issued, then there will be no oil and gas development and no effects upon a state's coastal zone. If one is issued, its *intended effect* is to produce oil and gas development, which necessarily has coastal impacts²⁶ Moreover, as the Ninth Circuit observed, "decisions made at the lease sale stage in this case established the basic scope and charter for subsequent development and production." DOI Pet. at 13a.²⁷

Petitioners, however, seek to avoid the statutory language "directly affecting" by substituting a variety of phrases for it. For example, they assert that it reaches "only those federal activities that have a clear, immediate and identifiable impact on the coastal zone." DOI Br. at 25.²⁸ Elsewhere they assert that "direct effects" are those

²⁶The District Court found "ample evidence within the administrative record" that Lease Sale 53 "directly affects the coastal zone." DOI Pet. at 62a-63a. Among the direct effects detailed by the District Court in the area of the tracts challenged by respondents were the oil spills estimated to occur by the United States Geological Survey; the "unavoidable effects . . . on the quality of the surrounding water" from "[n]ormal offshore operations" like pipelaying, drilling, construction of platforms, chronic spills from platforms, and the discharge of treated sewage; the impacts on fish and invertebrate populations from drilling muds and cuttings; the displacement of recreational areas by OCS-related onshore facilities; the disruption of artifacts of historic interest and aboriginal archeological sites known to exist in the area; and "the likelihood that development and production activities may jeopardize the existence of the southern sea otter and the gray whale." DOI Pet. at 63a-65a.

²⁷As discussed *infra* at 31-34, the selection or deletion of tracts and the adoption of lease stipulations profoundly affect, *inter alia*, "whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic and the siting of on-shore construction." DOI Pet. at 13a. Moreover, the lease sale stage is the only meaningful opportunity for analysis of the cumulative effects of development on the tracts leased, as discussed *infra* at 34, 39-40.

²⁸Similarly, petitioner WOGA appears to argue that an OCS lease would have such "direct effects" only if there were either a "physical activity" which DOI would conduct at the leasing stage

which occur "proximately" or "without any intervening agency, instrumentality or influence." *Id.* at 21-22; WOGA Br. at 36.²⁹ However, these are distinctly different formulations than "[t]he plain language of Section 307(c)(1)" (DOI Br. at 25), and are entirely of petitioners' own making.

On the other hand, petitioners devote little or no attention to the definitions which Congress itself has supplied, in the legislative history of the provision at issue. For example, the 1971 Senate Report explained the intent of Congress concerning the federal activities which were to be subject to Section 307(c)(1):

or activities which OCS lessees would conduct "immediately after obtaining leases." WOGA Br. at 12. Surely, however, the fact that a lease is a piece of paper rather than a "physical activity" is not dispositive of the question, so long as there is a sufficient nexus between the lease and the effects on the coastal zone produced by the intended uses of the property leased. *See Davis v. Morton*, 469 F.2d 593 (10th Cir. 1972) (rejecting the argument that environmental effects resulted from the lessee's operations and not from the approval of the lease by a federal agency). Nor are these effects any less "direct" because they do not occur "immediately." The fact that OCS development may occur years after the lease rather than the next day does not *ipso facto* make the effects of an OCS lease any less "direct." In this latter respect, the NEPA regulations, relied upon by petitioners (DOI Br. at 22 n. 19, WOGA Br. at 36), which define "direct effects" as those which "occur at the same time and place" as the action, are inapposite. Moreover, it is ironic that petitioners rely upon a definition adopted by an agency without any responsibility for interpreting the CZMA, and at the same time reject the definition adopted by NOAA, the one agency designated by Congress with that responsibility.

²⁹As the District Court observed, the tort concepts of "proximate" and "intervening cause" were created by the courts to *limit* tort liability and have no relevance to a statute designed to *foster* inter-governmental coordination in the management of coastal resources. DOI Pet. at 59a. Moreover, even assuming these tort concepts had been incorporated into the statute by Congress, the District Court properly concluded that their literal application would not alter its decision. *Id.* at 60a-61a.

"[I]t is intended that any lands or waters under Federal jurisdiction and control, within or adjacent to the coastal and estuarine zone, where the administering Federal agency determines them to have a *functional interrelationship* from an economic, social, or geographic standpoint with land and waters within the coastal and estuarine zone, should be administered consistent with approved state management programs."

S. Rep. No. 526, 92d Cong., 1st Sess. 30 (1971) (emphasis added).³⁰ In 1980, when Congress reauthorized the CZMA, Pub. L. 96-464, 94 Stat. 2060 (1980), the House Report restated the 1971 formulation of the "functional interrelationship" test, quoted above, and added this further clarification:

"Thus, when a federal agency initiates a series of events of coastal management consequences, the intergovernmental coordination provisions of the Federal consistency requirements should apply."

H.R. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980); *see also* S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Congress has thus expressed its own understanding of the meaning of "directly affecting." The consistency re-

³⁰As petitioners note, early versions of Section 307(c)(1) applied only to federal activities "in" the coastal zone. DOI Br. at 23. In 1972, the Conference Committee substituted the "directly affecting" language now found in the Act. *Id.* Petitioners assert that Congress intended, nevertheless, to retain the original limitation of Section 307(c)(1) to federal activities "in" the coastal zone and substituted the phrase "directly affecting" to further limit the scope of Section 307(c)(1). *Id.* at 24. Petitioners do not purport to rely on any "explicit legislative history" to support their inference, but merely assert that "it is evident." *Id.* at 23, 24. However, the trial court correctly found that this change was intended to expand the scope of the provision. DOI Pet. at 46a. This conclusion is unavoidable since the language is clearly of broader import than the language originally proposed. Moreover, contrary to petitioners' assertion, the legislative history of the Act reflects Congress' specific intent that the federal activities covered by Section 307(c)(1) include "... activities in or out of the coastal zone which affect that area." S. Rep. No. 277, 94th Cong., 1st Sess. 37 (1975) (emphasis added).

quirement of Section 307(c)(1) applies whenever the administration of areas under federal jurisdiction and adjacent to the coastal zone, like the OCS, has a "functional interrelationship" with the coastal zone, or whenever a federal agency "initiates a series of events of coastal management consequences," as with OCS leasing. As NOAA has noted, these two tests are interchangeable, and, indeed, were carried forward by NOAA in the regulations promulgated by it under the CZMA, defining "directly affecting." See 44 Fed. Reg. 37143 (1979). In those final regulations NOAA expressly stated that "Section 307(c)(1) of the CZMA applies to DOI's OCS pre-lease sale activities directly affecting the coastal zone." *Id.* at 37142.³¹

The lower courts did no more than give effect to these Congressional tests. As the Ninth Circuit stated, "Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased." DOI Pet. at 13a.³² Accordingly, it held that Lease Sale 53 was subject to the consistency requirements of Section 307(c)(1).

³¹That position was restated by NOAA on subsequent occasions, until after the instant suit was filed. At that time, NOAA proposed to revise its regulations to adopt the view previously espoused by Interior that the provision did not apply to lease sale activities. After congressional resolutions objecting to the proposed revision were introduced, NOAA withdrew it. See 46 Fed. Reg. 50976-77 (1981); see also DOI Pet. at 17a-18a, 57a-58a.

³²Similarly, the District Court held:

"Clearly, the consistency requirement should apply when a federal agency initiates a series of events which have consequences in the coastal zone. Any other interpretation would thwart the purpose of the Act." DOI Pet. at 51a (emphasis added).

In *E.E.O.C. v. Wyoming*, 103 S.Ct. 1054, 1062 (1983), relied upon by petitioner WOGA (Br. at 35 n. 27), this Court stated that "a virtual chain reaction of substantial and almost certainly unintended consequential effects" might flow from the application of federal wage and hour laws to the states, as an explanation for its decision in *National League of Cities v. Usery*, 426 U.S. 833,

Petitioners prefer to accord no weight to Congress' own effort to define "directly affecting,"³³ in light of what petitioners conceive to be the "plain meaning" of "directly." DOI Br. at 20-21; WOGA Br. at 21, 35-36. However, when such legislative history is available as an "aid to construction of the meaning of words as used in the statute . . . there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on superficial examination" to petitioners. *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543-44 (1940).

Moreover, petitioners seek to obscure the purposes of the CZMA, as discussed *supra* at 7-14, despite this Court's observation in *Bowsher v. Merck & Co.*, 103 S.Ct. 1587, 1592 n.7 (1983), that the word "directly" in the statute there reviewed "does not dictate an answer" and that it is necessary to "analyze the policies underlying the statutory provision to determine its proper scope." As discussed next, the courts below did just that in arriving at their interpretation of Section 307(c)(1).

III. THE APPLICATION OF CONSISTENCY REVIEW TO LEASE SALE 53 IS NOT ONLY FEASIBLE BUT ESSENTIAL TO THE ACHIEVEMENT OF THE PURPOSES OF THE CZMA.

The thrust of petitioners' argument has a familiar refrain: that their compliance with the consistency review procedures in Section 307(c) should be deferred until a time when there is "optimal" information available or when "certainty" can be achieved in making these consistency
852 (1975), that such laws operated to "directly displace the States' freedom to structure integral operations." (emphasis added). Thus, this Court has recognized, as the Ninth Circuit recognized below, that effects resulting from a chain of events are nonetheless "direct" effects.

³³In particular, they argue that the 1980 legislative history is entitled to no weight. DOI Br. at 40, 41; WOGA Br. at 42, 43. However, petitioners have ignored the fact that the "functional interrelationship" test is drawn from the legislative history of

determinations. See, e.g., DOI Br. at 18, 43.³⁴ In fact, as demonstrated below, it is only at the lease sale stage that tract selection and deletion and the promulgation of lease sale stipulations can be dovetailed with the coastal management program. Those determinations can be made on the basis of the information then available. To defer consistency review until "optimal" information is supposedly available will lead to later piecemeal review, and will, indeed, allow the federal government to escape any consistency review of its own actions. As the courts below determined, this "wait and see" attitude would seriously defeat the purpose of the CZMA that there be early application of the management program's strictures to activities which will have an important impact upon the coastal zone.

Congress' deliberations in originally enacting the CZMA in 1972. Moreover, the courts below properly concluded that the 1980 legislative history is entitled to substantial weight. DOI Pet. at 15a-16a, 50a-51a; see also *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n. 8 (1980) and the cases cited therein.

³⁴In a host of cases, the courts have rejected agency arguments that performance of their statutory responsibilities should await the day when more information is available and greater certainty could be secured. As the court stated in *Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 25 (D.C. Cir. 1976):

"Awaiting certainty will often allow reactive, not preventive regulation. Petitioners suggest that anything less than certainty, that any speculation, is irresponsible. But when statutes seek to avoid environmental catastrophe, can preventive albeit uncertain decisions legitimately be so labeled?"

Similarly, in *Illinois v. Gorsuch*, 530 F.Supp. 340, 341 (D.D.C. 1981), the court refused to countenance a further delay in promulgating regulations under a statute because "Congress did not direct the Agency to resolve every conceivable problem before issuing regulations." Finally, in *Scientists' Institute for Public Information, Inc. v. Atomic Energy Commission*, 481 F.2d 1079, 1086 (D.C. Cir. 1973), the court refused to accept the agency's argument that the project was of a "remote and speculative nature" and "remains uncrystallized in form and undetermined in application," as a basis for deferring compliance with NEPA.

A. Certain Vital Determinations of Consistency Can Be Made Only at the Lease Sale Stage.

The Solicitor General asserts that the deferral of consistency review to the time when the lessee submits exploration and development plans under Section 307(c)(3)(B) fully satisfies the purposes of the CZMA and renders it unnecessary to apply Section 307(c)(1) to the precedent issuance of OCS leases. *See* DOI Br. at 47-48. The answer to this argument was supplied *by the Department of Justice* in rejecting identical arguments made by the Department of the Interior only four years ago:

"Paragraph (B) [of Section 307(c)(3)] is designed to relieve the lessee of the burdens and delays resulting from successive consistency determinations for the many license and permit applications that may follow the grant of a lease and the approval of an exploration, development, or production plan. Under § 307(c)(3)(B) there will be a single consistency review following the submission of the plan by the lessee, and that review will cover any future activities described in detail in the plan. Section 307(c)(3)(B) thus simplifies the regulatory process during the post-leasing period. *It has no bearing on the consistency requirements antedating that stage of the leasing process. It is well possible that some of the preleasing activities of the Secretary of the Interior will give rise to consistency problems which cannot be reviewed at all under the paragraph (B) procedure, or for which such review comes too late. It is our opinion that with respect to pre-leasing activities § 307(c)(1) and § 307(c)(3)(B) can both be given effect. . . .*"³⁵

Because Lease Sale 53 defined the physical and operational parameters for all of the subsequent exploration and

³⁵Letter, April 20, 1979, to C. L. Haslam, General Counsel, Department of Commerce, and Leo M. Krulitz, Solicitor, Department of the Interior, from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, Cal. Exh. L-15, J. A. at 43 (emphasis added).

development, it will certainly "give rise to consistency problems which cannot be reviewed at all" under Section 307(c) (3)(B) "or for which such review comes too late."³⁶ Fundamentally, the lease sale creates a *subdivision* of the OCS. It establishes those tracts where development may occur, specifies through lease stipulations the conditions for such development, and excludes other areas from development altogether.³⁷ As the Ninth Circuit held below:

"... decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction." DOI Pet. at 13a.³⁸

³⁶A decision of the Department of the Interior to offer thousands of acres of the OCS for development "is regarded as among the most significant Federal actions affecting the Coastal Zones." Staff of Senate Comm. on Commerce, 93d Cong., 2d Sess., *Outer Continental Shelf Oil and Gas Development and the Coastal Zone* 79 (Comm. Print 1974).

³⁷In this respect it is analogous to the subdivision of land by local governments. Just as Interior retains the right to approve exploration and development on the subdivided tracts, so local governments retain the authority to approve or deny building permits for homes on lots created pursuant to a subdivision of land. Nevertheless, a local government's approval of the subdivision itself is considered to be the major land use decision because it determines which areas will be made available for development and which areas will require support services. Moreover, just as Interior sets stipulations in its lease sale, local governments also typically attach conditions to their approval of a subdivision map that determine the primary conditions under which development will be allowed to proceed, if at all. See generally J. Rose, *Legal Foundations of Land Use Planning* 315-54 (1979).

³⁸Indeed, outside this litigation, the Department of Interior has characterized the effect of an OCS lease in the same manner:

One significant decision made in offering an OCS area for leasing is the selection or deletion of particular tracts. Thus, tracts under consideration for leasing may lie in proximity to what Congress identified in the CZMA as a "coastal resource of national significance," such as a "coastal wetland, beach, dune, barrier island, reef, estuary, or fish and wildlife habitat." 16 U.S.C. § 1453(2). To the extent these areas of national significance have been identified in a coastal management program pursuant to Congress' mandate, and provisions to protect these resources have been established therein, leasing for oil or gas development anywhere in their vicinity may be undesirable—regardless of its precise ultimate location.³⁹

"... the leasing of OCS land sets in motion a process which can affect interests at all levels, and many decisions are made in that process which, in part, determine the manner in which any subsequent development may take place." Department of Interior, Bureau of Land Management, *Intergovernmental Planning Program for OCS Oil and Gas Leasing, Transportation and Related Facilities* 4 (1979). As Interior has further stated:

"The tentative scheduling of an area for OCS leasing is a *major decision* in that it *establishes* the resource use conflict by identifying the potential new use (oil and gas extraction) that will possibly *conflict with present uses* (fishing, recreation, transportation, etc.). . . .

Stipulations, operating orders and tract deletion are the most prominent administrative mechanisms through which to apply environmental information. (Note: Stipulations are formulated and required at the lease sale stage.)."

Department of Interior, Bureau of Land Management, *Study Design for Resource Management Decisions: OCS Oil and Gas Development and the Environment* 2-1 (1978).

³⁹As part of its objections to the leasing of certain tracts in the Santa Maria Basin in Lease Sale 53, the California Coastal Commission noted that "a large spill in the Santa Maria Basin, where BLM predicts 3.25 large spills over the life of the producing fields could jeopardize the entire population of the threatened sea otter." J. A. at 124. Moreover, contrary to petitioners' characterization, the Commission was concerned also about the protection of additional important resources, other than the sea otter. *Id.* at 122.

Similarly, the topography or weather conditions of an area may make valuable resource areas particularly vulnerable to OCS development.⁴⁰ Consistency with a management program which takes cognizance of these conditions may require that no development—again, regardless of its precise location—be allowed within that area. As a final example of a matter of concern in a management program, a tract under consideration for leasing may be unduly close to established pathways for ocean vessel traffic.⁴¹ Depending on the circumstances, sufficient information may clearly exist in any of these situations to make decisions at the lease sale stage as to whether or not particular tracts should be offered.

The second important decision made at the leasing stage is the inclusion of particular stipulations as terms of the lease sale. As the District Court noted, stipulations may be drafted to "influence the flow of vessel traffic, the placement of platforms and drilling structures, as well as the siting of on-shore construction . . . [and to] determine what equipment is to be used and what training is to be provided by lessees to those working on the tracts." DOI Pet. at 45a-46a. For example, lease sale stipulations, together with tract selections, can provide assurance (or at least preserve the option) that pipelines, environmentally preferable in some cases to tankering as a means of bringing oil to shore, will be required in connection with the

⁴⁰The Coastal Commission expressed particular concern, for example, about the proximity of Lease Sale 53 to rocky areas along central and northern California with small coves or bays, where cleanup of oil spills would be difficult and the heaviest damage to marine life would occur. J.A. at 124. It also noted that wind and wave conditions near Elkhorn Slough, a National Estuarine Sanctuary, and Tomales Bay, adjacent to the Point Reyes National Seashore, would make containment of oil spills nearly impossible in those areas. *Id.*

⁴¹The Coastal Commission's comments on Lease Sale 53 expressed concern about this problem. See J.A. at 124.

development of tracts.⁴² Indeed, as the Coastal Commission has itself noted in the context of Lease Sale 53, lease sale stipulations may be an effective alternative for avoiding the necessity of tract deletions, in order to protect resources identified as valuable in the coastal management program. J.A. at 77.

Without question, in some instances the decisions required to tailor OCS development to the provisions of a coastal management program will be appropriately made on a tract-by-tract basis when individual exploration or development plans are submitted to the state for consistency review under Section 307(c)(3)(B). Other decisions, as described above, are inherent in the selection or deletion of tracts and the setting of stipulations, and can thus only be made at the lease sale stage. As the Ninth Circuit observed regarding Lease Sale 53:

"[A]t this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the latter stages consistency determinations would be made on a tract-by-tract basis under § 307(c)(3)." DOI Pet. at 13a.

In sum, these are "consistency problems which cannot be reviewed at all" under Section 307(c)(3)(B) or "for which such [later consistency] review comes too late." J.A. at 43.

B. Contrary to Petitioners' Assertions, Sufficient Information Exists to Make These Consistency Determinations at the Lease Sale Stage.

Petitioners assert that a host of "uncertainties" at the OCS leasing stage make it impossible to "guarantee" that all subsequent development will be consistent with a coastal management program. DOI Br. at 43. However, they do

⁴²Thus, tracts can be aggregated and leased concurrently so that they afford the greatest potential for sufficient oil developments occurring together to justify pipelines as an economical matter.

not take account of the information which is both available at the leasing stage and sufficient to make the kinds of determinations described above, and they improperly characterize the consistency review as requiring impossible "guarantees." Their own practices in prior lease sales belie the abstract arguments made here.

For many of the coastal management concerns associated with a particular lease sale, it is simply immaterial that there may be a "series of sequential unknowns" (DOI Br. at 45) which make it impossible for the Secretary to predict with certainty at the lease sale stage whether or precisely where OCS development will occur. If proposed tracts are in proximity to a particularly sensitive wildlife habitat or particularly volatile seas, he need not await the expenditures of significant sums of money by the oil companies in planning and exploration before deciding that these tracts are simply not appropriate for any kind of oil development.⁴³ Alternatively, these environmental conditions may dictate certain lease sale stipulations in order to achieve consistency with a management program,

⁴³Nor does Interior correctly portray the state of its own knowledge at the time a lease sale is made. Several years of preparation and study by Interior precede each lease sale. In addition to the information developed and reviewed in the draft and final environmental impact statements on Lease Sale 53, for example, special studies were done that included oil spill risk analyses, alternative oil and gas transportation scenarios, analyses of the sensitivity of marine life in the area to development disturbances, and air quality modeling of projected impacts of the lease sale. Moreover, as a part of these presale preparations, Interior and the oil industry expend considerable effort to determine the size and location of potential oil reserves. See, e.g., Final Environmental Impact Statement on OCS Lease Sale No. 53, C.R. 3, Cal. Exh. L-2 at 1-9—1-13. As the District Court held, the activities that occur during this period, including the call for nominations of tracts, the preparation and circulation of an environmental impact statement, and the publication of a final notice of sale, "define and establish the basic parameters for subsequent development and production." DOI Pet. at 45a.

as previously noted—regardless of the precise location of development thereafter.”

At bottom, the asserted handicaps in making these kinds of determinations stem from a fundamental misconception of the nature of the consistency obligation. The application of Section 307(c)(1) to the lease sale does not require that the Secretary of the Interior issue impossible “guarantees,” based upon “speculative assumptions” that all “hypothetical future activities” will be consistent with a coastal management program. DOI Br. at 49.

The essential inquiry in consistency review is not one which requires the capacities of a soothsayer. Rather, as the California Coastal Commission stated in its comments on Lease Sale 53, the question is whether the available information allows the Department of the Interior “on balance, *at this time* under the Management program to determine that there is *no way* to develop those tracts

“In the example drawn by the Solicitor General (DOI Br. at 46), if there is “an unacceptably high risk” of an oil spill in the area of a particularly valuable fish or wildlife habitat but no similar concern associated with the potential development of “commercially valuable natural gas,” the solution might be a lease stipulation that industry would only be allowed to produce gas and not oil on these tracts. Similarly, “if it may be possible,” as the Solicitor General surmises, to develop a plan later that “will reduce the risk of an oil spill to a level acceptable to the state” (DOI Br. at 46), then it may also be “possible” to draft stipulations at the OCS leasing stage to provide the requisite assurances that development would not be allowed in the absence of such reduced risk. On the other hand, the Secretary might determine, based on the requirements of the management program, that it was not possible to reduce the risk to an acceptable level and delete the tracts at the outset. In any of these circumstances, industry and state and local governments would be able to proceed with their planning with an understanding of where development will be allowed and under what conditions, based on the Secretary’s application of the coastal management program.

consistent with the policies of the California Coastal Act." J.A. at 78 (emphasis added).⁴⁵

Indeed, the phased decisionmaking process established under OCSLA, upon which petitioners place such heavy reliance, does not require that all important decisions be deferred to later stages of the OCS process, as petitioners imply. DOI Br. at 27-35; WOGA Br. at 21-31. Decisions are made at each stage appropriate to the level of information available at that stage. As stated by the Court of Appeals for the District of Columbia Circuit, in reviewing Interior's five-year leasing program, the procedures embodied in the 1978 OCSLA Amendments are "pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent." *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981). In that case, the court rejected the same arguments made by Interior here, that the information at early stages of the OCS process was too "speculative" to consider:

"Although the continual collection and assimilation of pertinent information must of course continue throughout the OCS process, and although the speculative nature of any information may well affect the weight the Secretary attaches thereto in drawing up the leasing program, § 18(a)(2) nonetheless requires the Secretary at the program stage to consider every factor listed therein on the basis of the best information available, and to base the leasing program upon the information thereby obtained." *Id.* at 1307.

⁴⁵In its initial review of Lease Sale 53, the Commission determined that the information available at the time required the deletion of only 31 of the 113 tracts in the Santa Maria Basin of the OCS. The Commission made clear that it was not implying that "all development of the other 82 tracts would be consistent" when exploration or development plans were submitted, but only that there were no reasons, on balance, at that time to determine that there was "no way" to develop those tracts consistently with the management program. J.A. at 78.

In fact, in past lease sales the Department of Interior has made the very kinds of determinations that would be required of it in consistency review. For example, in Lease Sale 48, which preceded Lease Sale 53, Interior deleted 24 tracts in the Santa Barbara Channel at the lease sale stage expressly for a purpose similar to one of the state's concerns in Lease Sale 53—"[t]he objective of protecting the valuable seabird and marine mammal rookeries" in that part of the sale area.⁴⁶ In addition, Interior has previously conceded that imposition of lease stipulations can substantially reduce adverse coastal impacts which would otherwise occur.⁴⁷

There is simply no practical foundation for petitioners' arguments that there is insufficient information at the lease sale stage to render meaningful determinations of consistency.

C. Deferral of Consistency Review to the Exploration and Development Phase Defeats the Essential Purposes of the CZMA.

If the strictures of a coastal management program are applied only to individual exploration or development plans on a tract-by-tract basis, then the broader concerns of the management program will be foregone entirely.

⁴⁶Letter from Secretary Andrus to Governor Brown (June 29, 1979). Similarly, in partial response to some of the other concerns expressed by the State of California with respect to Lease Sale 48, Secretary Andrus determined that there would be no petroleum exploration rigs in the vessel precautionary area outside the Ports of Los Angeles and Long Beach; determined that there would be no oil or development within six miles of the Santa Barbara Channel Islands, thus protecting the wildlife there from disturbance and preserving the option of designating that area as a marine sanctuary; and made the addition of petroleum reserves in the western Santa Barbara Channel more likely, thereby increasing the prospects for adequate oil production in that area to justify construction of a pipeline in place of tankers to carry oil to market. *Id.*

⁴⁷Solicitor's Opinion (October 1979), C.R. 3, Cal. Exh. L-11 at 8; *Alaska v. Andrus*, 580 F.2d 465, 471, 478 (D.C. Cir. 1978).

Moreover, the impetus which the CZMA was intended to give to *early* intergovernmental coordination—among federal, state and local governments—in dealing with coastal management problems, will be frustrated. Indeed, the federal government would thereby be excused from all responsibility to assure that *its activities* are consistent with coastal management programs. In all of these respects, petitioners' attempt to avoid consistency review at the lease sale stage defeats the basic purposes for Congress' enactment of the CZMA.

Evidence presented by respondents in the District Court graphically demonstrated the piecemeal and random manner in which the exploration and development plans in the Santa Barbara Channel, for example, were submitted by the lessees for the state's consistency review under Section 307(c)(3)(B). Affidavit of Mari Gottdiener, J.A. at 152-155. In the two and one half years after the federal approval of California's management program, 27 different exploration or development plans were submitted randomly for different tracts within this single area. *Id.* The broader concerns of the California coastal management program—*e.g.*, determination of which areas should be protected from the risk of oil spills, which modes of oil transportation should be employed and where on-shore support facilities should sensibly be located—are impossible to address when consistency review is this fragmented.

In *California v. Watt*, 668 F.2d 1290, 1306 (D.C. Cir. 1981), the court noted that “[w]hen a decision is being made on a particular lease sale, or a particular exploration, development or production plan, the focus of the inquiry is on the propriety of that particular lease sale or plan.” Accordingly, the court concluded that it was impossible to address the broader concerns of OCS development (in that case, the five year leasing program) “*in the context of a decision on the placement of a particular exploratory well.*” *Id.* at 1306 (emphasis added). Yet, this is precisely

the burden which petitioners here seek to thrust upon state and local governments by suggesting that consistency review can be deferred to the exploration and development phases.

In reviewing the five year leasing program, the court in *California v. Watt* emphasized that the earlier steps in the OCS process become "the basis for future planning by all affected entities, from federal, state, and local governments to the oil industry itself" (668 F.2d at 1299) and held that Congress therefore did not "envision the deferral" of Interior's consideration of the relevant factors until some later date when more information would be available. 668 F.2d at 1305. These same concerns underlie the Ninth Circuit's ruling in the instant case:

"Thus, a major purpose of the CZMA is to avoid conflict and encourage cooperation between the federal and state governments in developing a comprehensive plan for long-term management of the resources in the coastal zone. 16 U.S.C. §§ 1451, 1452. To effectuate this purpose, the state must be permitted to become involved at an early stage of a significant and comprehensive activity, such as Lease Sale 53, that will eventually have an appreciable impact on the coastal zone. The narrow definition urged upon us by the federal appellants would preclude this early involvement." DOI Pet. at 14a."

Finally, it bears emphasis that if consistency review is not undertaken at the lease sale stage, but is deferred to the time when exploration or development plans are submitted, then the "federal activity" in OCS development

"Despite the Solicitor General's contrary assertion (DOI Br. at 42), "the immediate purpose of Section 307(c)(1)'s consistency requirement is . . . to provide coastal states with an opportunity to participate in the initial decisionmaking or planning stages of federal activities on the outer continental shelf." See S.Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) ("intergovernmental coordination for purposes of OCS development commences at the earliest practicable time").

escapes consistency review altogether and the Secretary of the Interior will never be required to take into account the coastal management program in this context. Once the lease sale occurs, the initiative passes to industry. The later review is confined to plans for specific tracts submitted by each lessee, in the order and time of its own choosing, and it is the applicant—not the Secretary—who must certify consistency at that stage under Section 307(c)(3). From a practical standpoint, the lease sale is thus the only stage at which certain matters can be decided effectively—or, indeed, at all—by the federal government.

D. The Consistency Review Process Required Under Section 307(c)(1) Is Not Rendered Superfluous by the OCSLA Consultation Process at the Lease Sale Stage.

Petitioners also argue that Section 307(c)(1) is superfluous because of the opportunities for consultation accorded the states prior to OCS leasing under Section 19 of OCSLA, 43 U.S.C. § 1345. DOI Br. at 42. Indeed, petitioner WOGA argues that consistency review at the leasing stage is unnecessary because the coastal management program may be considered by the Secretary of the Interior through the back door of the consultation process under Section 19 of OCSLA. WOGA Br. at 26, 27. However, it is for Congress to decide whether its goals can be achieved through one statute or two, and it is clear that OCSLA and the CZMA were enacted to serve markedly different objectives (and establish distinctive procedures, as discussed *supra* at note 15).

The basic orientation of the CZMA and OCSLA differ considerably. As the District Court concluded in *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979):

"The CZMA was enacted primarily with a view to encouraging the coastal states to plan for the management, development, preservation, and restoration of their coastal zones by establishing rational processes by which to regulate uses therein. Although sensitive

to balancing competing interests, it was first and foremost a statute directed to and solicitous of environmental concerns."

On the other hand, in *Commonwealth of Massachusetts v. Andrus*, 594 F.2d 872, 885 (1st Cir. 1979), the Court described the "emphasis" of OCSLA as the "exploitation of oil, gas and other minerals, with, to be sure, all necessary protective controls." Accordingly, it would be a mistake to assume that the same objectives could be achieved through the application of OCSLA that were intended to be achieved by Congress through the specific mechanisms set forth in CZMA.

This Court has, moreover, recently rejected a similar invitation to determine whether particular federal laws are "redundant or unnecessary." *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 283 (1981). As stated in the *Hodel* case: "The short answer to this argument is that the effectiveness of existing laws in dealing with a problem indentified by Congress is ordinarily a matter committed to legislative judgment." *Id.* See also *Chemical Manufacturers' Ass'n v. Environmental Protection Agency*, 673 F.2d 507, 512 (D.C. Cir. 1982).

For the same reason, it is inappropriate for petitioners to argue that Congress' omission from the text of OCSLA of a specific reference to Section 307(c)(1) of the CZMA somehow disqualifies the latter provision from applying to OCS leasing.⁴⁰ Indeed, there are a number of statutes which

⁴⁰Petitioners argue that because OCSLA makes specific reference to the application of consistency review at the exploration and development stages of the OCS process, the omission from the statute of any reference to its application at the leasing stage is dispositive. See WOGA Br. at 21-31. However, as both petitioners concede, the legislative history of OCSLA itself shows congressional understanding that "under the [CZMA] . . . certain activities including *lease sales* and approval of development and production plans must comply with 'consistency' requirements. . . ." H.R.Rep. 590, 95th Cong., 1st Sess. 153 n.52 (1977). This unqualified statement, consistent with other Congressional expressions of intent

have application to OCS development which are not referred to in OCSLA.⁵⁰ Accordingly, there is no warrant for any restrictive reading of the consistency requirement in Section 307(c)(1) of the CZMA by reason of the existence of the OCSLA consultation process, or any provision in OCSLA itself.

IV. THE DECISIONS OF THE LOWER COURTS DO NOT PORTEND AN INCREASE IN LITIGATION OR A REDUCTION OF ENERGY DEVELOPMENT OR A LOSS OF FEDERAL-STATE COOPERATION

Petitioners raise the specter of additional litigation and reductions in OCS development and federal-state cooperation as the likely products of the decisions below. Although such contentions are more appropriately addressed to Congress' legislative judgment, there is no warrant for peti-

discussed *supra* at note 14, certainly does not fit petitioners' characterization of it as "a meager indication" (WOGA Br. at 26 n. 19) or a "hint" (DOI Br. at 34 n. 26) of congressional intent. Even so, petitioners have omitted the immediately succeeding statements in the report which underscore Congress' intent with respect to OCS leasing:

"Except for specific changes made by Title IV and V of the 1977 Amendments, nothing in this Act is intended to amend, modify or repeal any provision of the Coastal Zone Management Act. Specifically, nothing is intended to alter procedures under that Act for consistency if a State has an approved Coastal Zone Management Plan." H.R.Rep. No. 590, *supra* at 153 n. 52.

In fact, Congress formalized this intent in the savings clause of the OCSLA, 43 U.S.C. § 1566, which specifically provides that "nothing in this chapter shall be construed to amend, modify or repeal any provision of the Coastal Zone Management Act of 1972."

⁵⁰These statutes include the Marine Protection, Research and Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.*, the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.*, the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and the Deepwater Ports Act, 33 U.S.C. §§ 1501 *et seq.*

tioners' apprehensions that adherence to the decisions below will cause any disruption of OCS activities.

Consistency determinations are now being prepared by the Department of the Interior on all OCS lease sales without any apparent undue burden. *See* DOI Pet. at 19 n.18. In fact it is certainly arguable that there will be *less* delay and disruption of OCS leasing if coastal management programs are applied in Section 307(c)(1) consistency review at the lease sale stage, under the decisions of the lower courts, than if the states and local governments are relegated to review of individual exploration and development plans under Section 307(c)(3)(B) at a later stage of the process. As the District Court found:

"If the state is consulted only after the plans are drawn and the parameters for exploration and development are set, as a practical matter, it will be relegated to the defensive role of objecting to the proposals of individual lessees as they are presented. Thus, the comprehensive planning in accordance with the management plan cannot occur and there will be no opportunity for the orderly decisionmaking envisioned by the draftsmen of the CZMA." DOI Pet. at 46a.

NOAA has similarly observed that "implementation of this requirement at the OCS pre-lease sale stage should lead to minimization of adverse coastal environmental and socio-economic impacts, *thereby reducing conflicts with affected states and avoiding delay in the exploitation of offshore energy resources.*" 44 Fed. Reg. 37142 (1979) (emphasis added). Indeed, after California's objections to Lease Sale 48 were communicated to the Secretary of the Interior, the Department of Interior (although refusing to make a consistency determination) did subsequently delete the tracts which California found objectionable and California did not bring suit. Thus, WOGA's characterization of the

CZMA process as "merely a prelude to later federal litigation" (WOGA Br. at 14) is misplaced.⁵¹

Finally, petitioners assert that the lower courts' construction of "directly affecting" makes it impossible for a federal agency to determine "which of its activities will be implicated by the state program" and renders its participation in the *development* of management programs superfluous. DOI Br. at 25 & n. 21. However, petitioners' arguments are belied *by their own participation* in the development of California's management program. In its comments on the program prior to federal approval, the Department of the Interior specifically addressed the issue of whether the program applied to OCS leasing under consistency review. California Coastal Management Program, C.R. 3, Cal. Exh. L-18, Attachment J at 20. Both WOGA and the American Petroleum Institute, as well as Exxon Corporation, also commented on the OCS implications of the management program. *See, e.g., id.* at 29, 33, 34, 37, 40.⁵²

Petitioners' apprehensions are, moreover, beside the point. Congress has determined that the national interest in the coastal zone is best served by federally funded and approved coastal management programs, developed by states in cooperation with the federal government. Throughout its deliberations over the original enactment of the CZMA and its subsequent amendments and reauthorization, it has expressed its concern about the impact of OCS development on the coastal zone, and it has on a

⁵¹In addition, the Coastal Commission concluded, in its comments on Lease Sale 53, that there had been relatively fewer consistency review problems on the tracts that were included in Lease Sale 48 but were reviewed in this mediation process, than in the case of tracts from earlier lease sales consummated before California's management program went into effect. J.A. at 117-118.

⁵²Moreover, as discussed *supra* at 22-28, petitioners can scarcely claim to be surprised by the lower courts' construction of "directly affecting," since it was based on the legislative history of the CZMA's original enactment in 1972, subsequent Congressional statements on the subject and the NOAA regulations.

number of occasions unequivocally expressed its intent that OCS leasing be conducted consistently with approved coastal management programs. The lower courts did no more than give effect to this intent, as well as Congress' own formulations of what it meant by "directly affecting." Petitioners' reliance upon "policy considerations" and the provisions of a different statute—which do not conflict with the interpretations of the CZMA in the courts below—provides no support for a contrary interpretation.

CONCLUSION

The judgment of the Court of Appeals for the Ninth Circuit that Section 307(c)(1) of the CZMA requires the Secretary of the Interior to make a consistency determination concerning Lease Sale 53, should therefore be affirmed.

Respectfully submitted,

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Nos. 82-1326 and 82-1327

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

JAMES G. WATT, *et al.*,
Petitioners.

VS.

STATE OF CALIFORNIA, *et al.*,
Respondents.

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners.

VS.

STATE OF CALIFORNIA, *et al.*,
Respondents.

BRIEF OF RESPONDENTS NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

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QUESTION PRESENTED

Whether the lower courts properly determined that Outer Continental Shelf Lease Sale 53, which established the basic scope and charter for subsequent oil and gas development in an area adjacent to the California coastal zone, is a federal activity "directly affecting" that zone within the meaning of § 307(c)(1) of the Coastal Zone Management Act of 1972, 16 U.S.C. § 1456(c)(1), when that determination was supported by the purposes, policies, and legislative history of that provision and its longstanding interpretation by the federal agency charged with administering the Act.

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STATEMENT OF THE CASE

Respondents Natural Resources Defense Council, Inc. *et al.*, hereby adopt the Statement of the Case presented in their Brief in Opposition to Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit at 1-8 (filed jointly herein with the State of California and the County of Humboldt, *et al.*), and the Statement of the Case presented by the State of California in its Brief of Respondents herein, which supplements the former Statement.

SUMMARY OF ARGUMENT

In the Coastal Zone Management Act of 1972 (CZMA), Congress created a mechanism to protect the national interest in the beleaguered resources of the nation's coasts. The CZMA encourages coastal states to create coastal management programs meeting the resource-protective standards it sets and to seek federal approval of these programs by the Secretary of Commerce. As an important incentive for state participation in this federal scheme, § 307(c)(1) of the CZMA requires that federal activities "directly affecting" a state's coastal zone must be conducted in a manner that is, to the maximum extent practicable, consistent with a state's federally-approved coastal management program. Both courts below concluded that federal oil and gas Lease Sale 53, proposed by the Department of the Interior (DOI) for the outer continental shelf (OCS) immediately adjacent to California's coastal zone, directly affects that zone and, therefore, must be conducted consistently with California's coastal management program. These decisions are well-reasoned and fully supported by the purposes, policies, and legislative history of the CZMA and should be affirmed.

However, petitioners argue that "directly affecting" should be defined by principal reference not to the CZMA, where the provision at issue appears, but to the Outer Continental Shelf Lands Act (OCSLA), an entirely different statutory scheme promoting petroleum development on the

OCS. They argue, in effect, that the OCSLA is the sole vehicle bestowing federal management authority over the resources of the OCS and, thus, that the CZMA cannot vest other governmental agencies with any OCS management authority that differs from that expressly provided by the OCSLA. However, this Court has specifically recognized that the OCSLA is merely one of several federal statutes, including the CZMA, through which Congress has allocated federal authority over OCS resources.

The provisions of the CZMA affecting OCS management are not subsumed by the OCSLA, but serve an independent national interest, the protection of the fragile resources of the nation's coastlines. This important interest can only be effectuated by applying the consistency provisions of § 307(c)(1) to federal activities with serious foreseeable consequences in the coastal zone, of which OCS lease sales are a prime example, at the earliest practicable time. Despite petitioners' arguments, to do so will not undermine the OCS development mechanisms set up by the OCSLA, for Congress has expressly harmonized the two acts, both through general statements of purposes and policies and through an explicit savings clause in the OCSLA. Thus, the commonsensical construction of "directly affecting" adopted by the courts below properly recognizes Congress' careful accommodation of the national interest in OCS oil production expressed in the OCSLA and the national interest in coastal protection expressed in the CZMA.

In defining "directly affecting," the lower courts properly ignored petitioners' suggestions to start their inquiry with the OCSLA and looked first to the best sources of interpretation of a provision of the CZMA: the purposes and policies behind that act, the legislative history of § 307(c)(1) itself, and the interpretation of the provision by the National Oceanic and Atmospheric Administration (NOAA), the agency charged by Congress to administer the CZMA. All of these sources lead inexorably to the definition of "directly affecting" approved by the lower courts, that a federal activity "directly affects" a state's coastal zone if it sets

in motion a series of events that have consequences in the coastal zone or, put another way, if the activity has a functional interrelationship with the federally-approved coastal program's land and water use policies. Ironically enough, even the relevant passages of the legislative history of the 1978 OCSLA Amendments point to the correctness of this definition and the conclusion that § 307(c)(1) applies to OCS lease sales.

Thus, the lower courts clearly did not err in holding that Lease Sale 53 directly affects California's coastal zone. The lease sale sets the scope for all subsequent activities on the tracts available for lease. It defines the geographic parameters for potential oil drilling in a hitherto undeveloped area of the OCS immediately adjacent to California's coastal zone. During the pre-leasing phase, DOI has formulated the generic lease stipulations that will govern environmental safety and other standards for the conduct of lessees' operations. Postponing application of the consistency requirements of the CZMA to later phases of the OCS oil and gas process—as petitioners urge—would preclude the states from playing any meaningful role in these decisions affecting the nation's vital coastal resources, in derogation of congressional intent. This Court should uphold Congress' carefully designed scheme to protect the national interest in our coasts through cooperative federalism by affirming the lower courts' definition of “directly affecting.”

ARGUMENT

I

THE COASTAL ZONE MANAGEMENT ACT IS A VALID CONGRESSIONAL EXERCISE OF THE PARAMOUNT NATIONAL AUTHORITY OVER THE OUTER CONTINENTAL SHELF

In their Brief of Petitioners, the Western Oil and Gas Association, *et al.*, argue that the lower courts erred in holding that an OCS lease sale is a federal activity “directly affecting” the coastal zone within the meaning of § 307 (c)(1) of the CZMA, 16 U.S.C. §§ 1451 *et seq.*, § 1456(c)(1),

because so to hold would derogate the federal government's "exclusive proprietary control over the soil and seabed of the OCS." WOGA Br. at 17-18.¹ WOGA places great emphasis on the "1953 Compromise," the Submerged Lands Act, 43 U.S.C. §§ 1301 *et seq.*, through which Congress ceded to coastal states proprietary control over the continental shelf within three miles (or, in two cases, three nautical leagues) of those states' low tide lines, as evidence that Congress intended exclusive jurisdiction over the OCS to be vested in DOI under the OCSLA, 43 U.S.C. §§ 1331 *et seq.*, a part of that compromise. *Id.* at 18.

While respondents do not deny the paramountcy of federal authority over the soil and seabed of the OCS, we do take issue with WOGA's assertion that the OCSLA is the sole vehicle through which that authority has been exercised and that DOI is the sole agent vested with OCS jurisdiction. The 1953 Compromise, the legislative history of the CZMA, other federal statutes, and prior pronouncements of this Court all plainly demonstrate that Congress has properly exercised federal jurisdiction over the OCS in a variety of ways, and that the consistency provisions of the CZMA are one such exercise.

The reliance of WOGA on the decision of this Court in *United States v. Maine*, 420 U.S. 515 (1975), to support its

¹For the Court's convenience, we note at the outset several forms of citation that are used throughout this Brief. References to the Brief for Petitioners James Watt, *et al.*, are cited as "DOI Br. at ...". References to the Brief of Petitioners Western Oil and Gas Association, *et al.*, are cited as "WOGA Br. at ...". References to the Petition for a Writ of Certiorari of James Watt, *et al.*, are cited as "DOI Pet. at ...". All references to the opinions below are to those opinions as reproduced in the appendices of Interior's petition and will be cited as "DOI Pet. at ... a." References to the Petition of the Western Oil and Gas Association, *et al.*, are cited as "WOGA Pet. at ...". Exhibits from the District Court Docket Sheet are cited by their title, their number in the Clerk's Record (C.R.) and their exhibit designation, e.g., "California Coastal Management Program, C.R. 3, Cal. Exh. L-18 at 23." Documents from the Joint Appendix are similarly cited, with the abbreviation "J.A." replacing "C.R."

argument that DOI has exclusive jurisdiction over the soil and seabed of the OCS through the OCSLA is sorely misplaced. WOGA Br. at 18-19. In that case, the Court faced the issue of whether the Atlantic coastal states had jurisdiction over the OCS beyond the three-mile territorial limit established in the 1953 Compromise, by virtue of historical rights that these states asserted arose from their pre-1776 status as English colonies. The Court rejected their claims on the grounds that "paramount rights to the offshore seabed inhere in the Federal Government as an incident of national sovereignty."² 420 U.S. at 524. The Court examined the states' claim that Congress, in the 1953 Compromise, which "did indeed grant to the States dominion over the offshore seabed within the limits defined in the Act," repudiated those paramount rights. 420 U.S. at 525. It held that this was not the case, but rather that this grant of dominion was "merely an exercise" by Congress of the paramount federal authority over the OCS. 420 U.S. at 524-26.³

²WOGA is of course correct that this Court recently reaffirmed that the United States has paramount rights to the OCS seabed beyond the three-mile limit in *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 479 n.7 (1981), and *Maryland v. Louisiana*, 451 U.S. 725, 752-53 n.26 (1981). WOGA Br. at 18. However, this principle does not translate, as WOGA would have it, into one of the paramount control of the OCS by DOI through the provisions of the OCSLA. DOI is not the United States, but merely one agency of the federal government. It is Congress that determines how the paramount national authority over the OCS is to be allocated, and, as its grant of control over the submerged lands within the three-mile limit in the 1953 Compromise demonstrates, it may even assign that authority entirely to the coastal states if it finds this to be in the national interest.

³A series of earlier decisions of this Court make clear that the federal government, prior to 1953, had dominion over all submerged lands beyond the marine low tide line. *United States v. California*, 332 U.S. 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950). Thus, in the 1953 Compromise, Congress ceded to the states what previously was a zone exclusively under federal jurisdiction.

It readily follows that, if Congress, in its exercise of federal jurisdiction over the seabed, can grant dominion over a portion thereof to the states, it most certainly can involve the states in a federal scheme of coastal management that allows them some lesser share of authority over the management of the OCS. The CZMA is one such scheme, as this court explicitly recognized in *United States v. Maine*:

Exploitation of our resources offshore implicates a broad range of federal legislation, ranging from the Longshoremen's and Harbor Workers' Compensation Act, incorporated into the Outer Continental Shelf Lands Act, to the more recent Coastal Zone Management Act.

420 U.S. at 528 (footnote omitted; emphasis added).⁴

That Congress had the power to provide authority over the OCS through enactment of the consistency provisions of the CZMA is affirmed by *United States v. Maine*; that it expressly intended to do so is apparent not only from the explicit reference to the CZMA in that decision but from the relevant legislative history of both the CZMA and the

⁴The Court made plain that its reference was to resources of the OCS by citing with approval, in a footnote to the quoted language, a Senate Commerce Committee print that summarized the "legislation affecting the Outer Continental Shelf." 430 U.S. at 528 n.8. This report states:

Several federal statutes contain policy objectives and collectively establish a legal and administrative system for the management and control of outer continental shelf oil and gas development.

Outer Continental Shelf Oil and Gas Development and the Coastal Zone, A Report for the Committee on Commerce, U.S. Senate, 93d Cong., 2nd Sess. 55 (Comm. Print 1974) (emphasis added). In addition to the OCSLA and the CZMA, this report lists the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*, the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251 *et seq.*, and the Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. §§ 1431 *et seq.*, as among those that establish the federal system for management and control of OCS oil and gas development. *Id.*

OCSLA. As we will demonstrate, this legislative history plainly evidences the intent of Congress that the consistency provisions of § 307(c)(1) apply to DOI's OCS lease sales. See Part III.C. and D., *infra*.

In light of *U.S. v. Maine*, the legislative history, and other statutes that affect OCS management, WOGA's reliance on the "clear statement" rule is plainly misplaced.⁵ WOGA Br. at 18. Congress did not assign exclusive control over the OCS to DOI in the 1953 Compromise.⁶ Rather, as this Court recognized in *Maine*, the cession of dominion over the seabed to the coastal states in the Compromise

⁵WOGA's citation of *Employees v. Missouri Public Health Dept.*, 411 U.S. 279, 285 (1973), highlights a further irony of the "clear statement" doctrine WOGA presses upon this Court. WOGA Br. at 18. As the *Employees* case illustrates, this Court has regularly used the "clear statement" doctrine out of *solicitude* for legitimate state concerns. As in *Employees*, this Court should be "reluctant to believe that Congress in pursuit of a harmonious federalism desired to treat . . . states so harshly" as to deny federally-approved state programs all effect at the lease sale stage, when these sales have such extraordinary impacts upon the coastal zone, 411 U.S. at 286. The reasonable expectations of states which *voluntarily* enter into a cooperative partnership with the federal government should be protected—not frustrated, as WOGA would have it—by the clear statement doctrine. *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981). Since OCS development has long been understood as one of "the most significant Federal actions affecting the coastal zones," see *infra* at 28-29, now to deny participating states a substantive role at the stage of OCS development "which establishes the basic scope and charter" for subsequent events, DOI Pet. at 13a, would retroactively destroy one of the principal original incentives for state participation. See H.R. Rep. 878, 94th Cong., 2d Sess. 53 (1975).

⁶The cases that WOGA cites for the proposition that the OCSLA is a comprehensive scheme for regulation of the OCS, preempting the field of OCS management, do not support that proposition. WOGA Br. at 31. At best, these cases simply conclude that specific provisions of the OCSLA are controlling in specific fact situations. The same could be said of the provisions of virtually any statute and would in no way indicate a congressional intent to make that statute the exclusive vehicle for regulation of a given field. More-

underscores Congress' authority to provide for the management of the OCS in whatever ways would best serve the national interest, and the CZMA represents another legitimate exercise of that authority. Thus, no "clear statement" of specific application to DOI's OCS leasing activities is necessary on the face of § 307(c)(1) in order for this provision to so apply.⁷ The pronouncements of *Con-*over, none of these cases involved the relationship of the OCSLA to the CZMA.

WOGA's claims of OCSLA exclusivity as regards management of the OCS also ignore other federal statutes that plainly affect its management (see n. 4, *supra*, and n. 7, *infra*) and, indeed, § 307(c)(3)(B) of the CZMA, which specifically creates a procedure for consistency certification of OCS lessees' activities at the exploration and development-production phases. 16 U.S.C. § 1456(c)(3)(B). Given the way in which WOGA presents its argument, it is apparent that it would like the Court to believe that this section of the CZMA, enacted in 1976, is actually a part of the 1978 OCSLA Amendments. WOGA Br. at 28, 30-31. But Congress in 1978 amended the OCSLA to recognize a provision affecting the management of the OCS that it had created two years earlier *as part of the CZMA*, not the reverse. WOGA's theory of OCSLA exclusivity in the management of the OCS simply cannot withstand the weight of other federal statutory provisions, both specific and general, that provide a share of OCS management authority to governmental entities other than DOI.

⁷An analogous situation is presented by the Marine Protection, Research, and Sanctuaries Act (Marine Sanctuaries Act), 16 U.S.C. §§ 1431-1434. That act authorizes the Secretary of Commerce, with presidential approval, to designate as marine sanctuaries certain offshore areas "which he determines necessary for preserving or restoring such areas for their conservation, recreational, ecological, or esthetic values." 16 U.S.C. § 1432(a). Under the Marine Sanctuaries Act, the Secretary of Commerce must identify "the types of activities that will be subject to regulation" in the sanctuary, 16 U.S.C. § 1432(f)(1), and "shall issue necessary and reasonable regulations to implement the terms of the designation and control the activities described in it." 16 U.S.C. § 1432(f)(2).

Nowhere is DOI's OCS oil leasing program specifically mentioned on the face of the Marine Sanctuaries Act. Yet in two instances, pursuant to the Act, the Secretary of Commerce has designated, and the President has approved, marine sanctuaries in which

gress and this Court provide ample evidence of the propriety of such application.

II

WHILE THE TWO STATUTES ARE FULLY COMPATIBLE, THE COASTAL ZONE MANAGEMENT ACT SERVES NATIONAL PURPOSES DISTINCT FROM THOSE SERVED BY THE OUTER CONTINENTAL SHELF LANDS ACT. THESE PURPOSES CAN BE PROPERLY EFFECTUATED ONLY THROUGH BROAD APPLICATION OF THE PROVISIONS OF § 307(c)(1)

As previously noted, WOGA adopts the erroneous position that the OCSLA is the only federal statute affecting the management of the petroleum resources of the OCS. This faulty premise leads to WOGA's assertion that the OCSLA provides states with their sole means of involvement in the OCS leasing process. WOGA Br. at 21-31. To the extent that any provisions of the CZMA apply to DOI's OCS activities, WOGA attempts to portray them as part of the OCSLA statutory scheme. This argument

leasing of OCS tracts for oil exploration and development is expressly forbidden. These are the Point Reyes-Farallon Islands Marine Sanctuary, 46 Fed. Reg. 7936 (1981), and the Channel Islands Marine Sanctuary, 45 Fed. Reg. 65198 (1980).

The routine application of the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, to OCS lease sales also makes manifest the error of WOGA's invocation of the "clear statement" rule. Nowhere in the OCSLA or NEPA is there an explicit statement that the general provisions of NEPA requiring the preparation of environmental impact statements will apply to DOI's OCS lease sale proposals, yet it is beyond dispute that these provisions fully apply to them. *See, e.g., County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368 (2d Cir. 1977). The same is true of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* *See North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).

Clearly, Congress has allocated authority over the OCS not only through the OCSLA, but through other statutory vehicles, and not only to DOI, but to other agencies. No "clear statement" regarding the OCSLA is necessary for Congress to effectuate a provision, such as § 307(c)(1), that further allocates OCS authority.

seriously misreads both the CZMA and the OCSLA, denying any independent meaning to various provisions of the former while reading into provisions of the latter meanings that Congress never intended and that are at odds with the statutory language.

As will be seen in what follows, the CZMA and the OCSLA are independent but fully compatible federal schemes promoting separate national interests, both of which affect the management of the resources of the OCS. While the OCSLA is aimed at the orderly development of petroleum reserves offshore, the CZMA is intended to provide protection for the sensitive resources of the nation's coastlines. To interpret the CZMA's consistency provisions as entirely subsumed in the provisions of the OCSLA—as WOGA would have it—would obliterate the distinct purposes for which Congress enacted the CZMA.

A. The Purposes of the Coastal Zone Management Act, and the Mechanisms Through Which Those Purposes Are To Be Carried Out, Are Distinct from Those of the Outer Continental Shelf Lands Act

WOGA's lengthy analysis of the OCSLA and, in particular, the scheme it creates for state involvement in the OCS leasing process, is intended to support its conclusion that the OCSLA provides the only vehicle for state involvement and, hence, that the requirements of the CZMA, to the extent they apply at all to OCS leasing, are completely subsumed by the OCSLA.* WOGA Br. at 21-31. However, this analysis completely ignores the vastly different national purposes served by the two statutes in question and the distinct mechanisms each provides for state involvement in leasing decisions.

The OCSLA is a statute focused upon the development of the mineral resources of the OCS. *See, e.g.*, 43 U.S.C. §§ 1332, 1802. The Secretary of the Interior and his department are charged with implementing the OCSLA.

*While not arguing this point at any length, DOI seems to agree with WOGA's analysis. DOI Br. at 42.

43 U.S.C. § 1331(b). Provision is made in the OCSLA for affected coastal states and local governments, through their governors, to submit "recommendations to the Secretary regarding the size, timing, or location of a proposed lease sale or with respect to a proposed development and production plan." 43 U.S.C. § 1345(a). The manner in which the Secretary must respond to these recommendations is also prescribed. 43 U.S.C. § 1345(c).

The CZMA serves an entirely different purpose than the OCSLA, through a distinct statutory and regulatory scheme.⁹ Its primary focus is on the protection of the national interest in the resources of the nation's coastal zones. See 16 U.S.C. §§ 1451-52.¹⁰ To achieve this purpose, the Act provides for the promulgation of coastal management programs by the individual coastal states, which programs must meet the federal standards it prescribes. 16 U.S.C. §§ 1454-55. The Secretary of Commerce is empowered to approve proposed state coastal management programs if these meet the requirements of the Act. 16 U.S.C. §§ 1453(16), 1455. Among these requirements, a single state agency must be authorized to administer the coastal program. 16 U.S.C. § 1455(c)(5). Once a state's program receives federal approval, all federal agencies' activities "directly affecting" that state's coastal zone must be consistent, to the maximum extent practicable, with the program. 16 U.S.C. § 1456(c)(1). Under the Department of Commerce's regulations implementing this consistency requirement, it is the state's authorized coastal management agency that responds to a federal agency's initial

⁹See generally Linsley, Federal Consistency and Outer Continental Shelf Oil and Gas Leasing, 9 Boston C. Env'tl Affairs L. Rev. 429 (1981).

¹⁰See also *American Petroleum Institute v. Knecht*, 456 F.Supp. 889, 919 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979) ("Although sensitive to balancing competing interests, [the CZMA is] first and foremost a statute directed to and solicitous of environmental concerns"). A more thorough discussion of the purposes and policies behind the congressional enactment of the CZMA is presented in Part III.E, *infra*.

determination as to the consistency of its proposed activity with the state's coastal program. 15 C.F.R. §§ 930.18, 930.41-.42.

The uniqueness of the two statutes is obvious, but several points of distinction specifically regarding their applicability to OCS lease sales bear further examination here. Section 19 of the OCSLA, 43 U.S.C. § 1345(a), allows a state's governor and, through the governor, local government executives, to make recommendations about the size, timing, and location of a proposed lease sale based upon the state's and local government's parochial concerns with the sale. Such officials in *any* coastal state that would be affected by proposed leasing may make these recommendations. *Id.* The Secretary of the Interior must accept the recommendations unless he determines that they do not provide "a reasonable balance between the national interest and the well-being of the citizens of the affected State." 43 U.S.C. § 1345(c).

In contrast, under the provisions of the CZMA and NOAA's regulations implementing it, DOI must ensure that its proposed lease sale is consistent, to the maximum extent practicable, with the state's federally-approved coastal management program through preparation of a consistency determination. 15 C.F.R. § 930.34. The state's coastal management agency, not its governor, responds to this determination. Only those states for which the Secretary of Commerce has approved a coastal management program can avail themselves of § 307(c)(1). DOI's determination and the agency's response are based not upon the state's and local governments' general concerns but solely upon the provisions of the federally-approved program.

Clearly, the types of state involvement in OCS leasing proposals envisioned by the two statutes are not interchangeable.¹¹ Compliance with the provisions of the OCSLA

¹¹In the face of these radically different schemes, WOGA amazingly suggests that § 19 of the OCSLA is the proper vehicle through which a state should present its consistency concerns about a

does not replicate compliance with those of § 307(c)(1). The latter specifically require DOI to focus on the state's federally-approved coastal program and place upon DOI a duty to conduct its lease sale consistently, to the maximum extent practicable, with that program. The state coastal management agency, the agency with the greatest expertise on the provisions and application of the program, is afforded a formal mechanism for response. This process is intended to protect the national interest in the resources of the coastal zone through federal agency compliance with state-generated, federally-approved management programs. Neither § 19 nor any other provision of the OCSLA fulfills these purposes, and, thus, WOGA's attempt to portray application of § 307(c)(1) of the CZMA at the OCS leasing stage as redundant with or subsumed by those provisions must fail.¹²

B. The Consistency Provisions of the Coastal Zone Management Act Are Fully Compatible with the Provisions of the Outer Continental Shelf Lands Act

Related to its arguments that the consistency provisions of § 307(c)(1) are subsumed by the state involvement provisions of the OCSLA is WOGA's portrayal of the lower court's conclusion that § 307(c)(1) is applicable to OCS

proposed lease sale to the Secretary of the Interior. WOGA Br. at 27. WOGA would like the Court to ignore the divergent purposes the statutes serve and compress an independent statute whose requirements it finds inconvenient into another, less troublesome one. See H.R. Rep. No. 269, 97th Cong., 1st Sess. 11-12 (1981).

¹²The consistency provisions of the CZMA have always been viewed by Congress and the states as a major incentive for the states to create coastal management plans in compliance with the CZMA. See, e.g., H.R. Rep. No. 878, 94th Cong., 2d Sess. 53 (1975). As federal oil and gas activities on the OCS are regarded "as among the most significant Federal actions affecting the Coastal Zones," Outer Continental Shelf Oil and Gas Development and the Coastal Zone, *supra*, n. 4, at 79, it would have been illogical for Congress, in § 307(c)(1), to have provided no duty regarding OCS leasing sales distinct from that in § 19 of the OCSLA, which is available to any coastal state, with or without a federally-approved coastal management program.

lease sales as incompatible with the purposes and policies of the OCSLA. WOGA Br. at 31-32; 44-46. DOI advances a similar view. DOI Br. at 41-49. Both raise the spectre that the lower courts' finding of applicability of § 307(c)(1) to OCS lease sales will thwart the national interest in OCS development as expressed through the OCSLA by giving states a veto over DOI's leasing plans. DOI Br. at 27, 47; WOGA Br. at 44-46.

An examination of the provisions and purposes of the OCSLA and the workings of § 307(c)(1) of the CZMA shows the fallacy of these arguments. The lower courts' application of § 307(c)(1) to DOI's OCS lease sales is fully consonant with the OCSLA; moreover, the express terms of § 307(c)(1), and the NOAA regulations implementing it, demonstrate that the provision does not grant the states veto authority over OCS lease sale proposals.

Turning first to the provisions of the OCSLA, while it is true that a primary purpose of that act is to promote the "expeditious and orderly development" of the oil and gas resources of the OCS, 43 U.S.C. § 1332(3), this is not the sole purpose or policy it is intended to serve. Indeed, such development is expressly "subject to environmental safeguards." *Id.*; see also 43 U.S.C. § 1802(2)(B), (7). Further, *the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, . . . and of related developments and activity should be considered and recognized.*

43 U.S.C. § 1332(5) (emphasis added); see also 43 U.S.C. §§ 1332(4), 1802(4), (5), (6). Thus, while the OCSLA is aimed at orderly, and even expedited, development of oil and gas resources of the OCS, it is by no means a monolithic mandate to lease every acre of the OCS that might overlie recoverable petroleum regardless of a countervailing national interest in other resources and the potential adverse environmental consequences.

For its part, the CZMA requires state coastal zone management programs to have provided "adequate consideration of the national interest involved in planning for, and in the siting of [energy] facilities . . . which are necessary to meet requirements other than local in nature" before such programs may be approved by the Secretary of Commerce. 16 U.S.C. § 1455(c)(8); *see also* 16 U.S.C. § 1454 (b)(8). Prior to such approval, the Commerce Secretary must also ensure that the views of the federal agencies affected by the proposed program were adequately considered during its promulgation. 16 U.S.C. § 1456(b).¹³

These provisions from both acts plainly reveal that their purposes and policies are not antithetical. Rather, Congress has expressly harmonized the two schemes. Thus, to the extent that a state coastal management program, federally approved pursuant to the requirements of the CZMA, circumscribes OCS leasing decisions by DOI under the provisions of § 307(c)(1), this is fully in keeping with the purposes and policies of both acts. Read together, the CZMA and the OCSLA promote the national interest in offshore oil development responsive to the protection of other coastal resources.

Very explicit evidence that the application of § 307(c)(1) to OCS lease sales is compatible with the provisions of the OCSLA is provided by the savings clause of the OCSLA Amendments of 1978, which states:

Except as otherwise *expressly provided* in this chapter nothing in this chapter shall be construed to amend, modify, or repeal any provision of the Coastal Zone Management Act of 1972. . . .

43 U.S.C. § 1866(a) (emphasis added). This provision completely undercuts the claims of DOI and WOGA that the state involvement provisions of the 1978 OCSLA Amendments comprise an expression by Congress that the provi-

¹³DOI was among the agencies whose views were considered in the formulation of California's program. California Coastal Management Program, C.R. 3, Cal. Exh. L-18, Attachment J.

sions of § 307(c)(1) do not apply to DOI's OCS lease sales.¹⁴ DOI Br. at 28-30; WOGA Br. at 32.

Finally, we must lay to rest the fears raised by petitioners that the lower courts' determination that

¹⁴Petitioners' reliance on § 307(e) of the CZMA, 16 U.S.C. § 1456(e), a general savings clause, for the proposition that § 307(c)(1) does not apply to OCS lease sales is unavailing. DOI Br. at 26; WOGA Br. at 39. First, it completely ignores the fact that NOAA, in its regulations concerning the consistency provisions of § 307(c)(1), has specifically addressed § 307(e):

The duty the Act imposes upon Federal agencies is not set aside by virtue of section 307(e). The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c)(1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

15 C.F.R. § 930.32(a). In a comment to this regulation, NOAA noted: "Federal agency conformance with existing law is preserved as a result of section 307(e) of the Act. . . ." 44 Fed. Reg. 37146 (1979).

Second, the correctness of NOAA's analysis of § 307(e)—that it is simply intended to make clear that the required federal consistency with federally-approved CZMA programs is itself circumscribed by the requirements of existing law—is borne out by the legislative history of § 307(c)(1). The history of that specific provision demonstrates Congress' intent that it "cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies," including DOI's OCS leasing decisions. See Part III.C., *infra*. To read the general provisions of § 307(e) to deny a substantive application of § 307(c)(1) to OCS lease sales—and, by implication, other federal activities—would improperly override the express intent of Congress.

Finally, petitioners once again promote the erroneous notion that DOI is the federal government. While the CZMA shifted some federal jurisdiction, rights, and responsibilities "in the field of planning, development, or control of . . . submerged lands" from DOI to the Department of Commerce, this scarcely amounts to a diminution of federal jurisdiction in contravention of § 307(e).

§ 307(c)(1) consistency applies at the lease sale stage will somehow amount to a state veto, derailing the OCS development scheme created by Congress in the OCSLA. None of the respondents has ever maintained that § 307(c)(1) provides states a veto over DOI's leasing proposals. An examination of the section and NOAA's regulatory scheme for its implementation plainly shows that no such veto exists.

The duty that § 307(c)(1) imposes is upon the federal agency conducting the activity—here DOI—not on the state. It is DOI's duty under the section to conduct its activities in a manner consistent to the maximum extent practicable with the state's coastal management program. Thus, NOAA's regulations provide that it is DOI that performs the consistency determination for its proposed activity and submits that determination to the state. 15 C.F.R. §§ 930.34, 930.37. The state is given a formal opportunity to respond to the DOI consistency determination. 15 C.F.R. § 930.41-42. In the event of a serious disagreement over consistency, either party may seek mediation by the Secretary of Commerce. 15 C.F.R. § 930.43¹⁵ However, if mediation is not sought or proves unsuccessful, DOI may, at its discretion, go forward with the proposed lease sale based on its consistency determination.¹⁶ If DOI does proceed in the face of a dispute, the state may of course exercise its option to sue in order to enjoin the proposed lease sale. In that event the court will examine the propriety of DOI's consistency determination, i.e., it will

¹⁵See generally 15 C.F.R. §§ 930.110-116. Mediation is only available if all agencies in disagreement consent to participate. 15 C.F.R. § 930.112. It is not mandatory upon the parties to the disagreement nor, consequently, prerequisite to judicial review. 15 C.F.R. § 930.116.

¹⁶While a comment to the NOAA regulations encourages federal agencies to "suspend implementation of the activity beyond the 90-day period [of notice to the state that the regulations require] pending resolution of the disagreement," 44 Fed. Reg. 37149 (1979), it is clearly within a federal agency's discretion to go forward with a disputed activity if it determines to do so.

review the Secretary of the Interior's application of the provisions of the state's federally-approved coastal management program to the lease sale at issue.

In sum, under § 307(c)(1) as applied to a proposed OCS lease sale, *DOI* makes the consistency determination, *DOI* decides whether to go forward with the sale in the face of a dispute with a state's coastal management agency, and *DOI's* application of the provisions of the state's program (itself approved by the Secretary of Commerce as in conformity with the national requirements of the CZMA) is the subject of any judicial review that follows.¹⁷ This scheme can scarcely be characterized as a state veto of a federal program. Quite plainly, it represents a federal mechanism for the reconciliation of two important but sometimes competing national interests, offshore oil production and coastal resource protection. This mechanism, carefully wrought by Congress and the agency charged with implementing Congress' intent, should not be set aside in the name of protecting one federal agency, which erroneously purports to be the sole repository of federal management authority over the OCS, from alleged "state interference" that is actually an integral part of a national program of cooperative federalism.

III

THE MEANING THE LOWER COURTS GAVE "DIRECTLY AFFECTING" IS THE PROPER ONE

Petitioners urge that this Court bend the obligations and statutory duties created by the CZMA to match the special procedures of the OCSLA. WOGA Br. at 21-31; DOI Br. at 27-35. But to "look first to [the] provisions" of the OCSLA, WOGA Br. at 21-22, and then to insist that the CZMA be given a crabbed reading in order to assure that its requirements never go beyond the OCSLA's is to do things backwards by ignoring the CZMA itself, its pur-

¹⁷It is also worthy of note that, if a state abuses its coastal management program, the Secretary of Commerce can withdraw approval. 16 U.S.C. § 1458(d).

poses, policies, and history. Despite the lip service petitioners pay to the "plain meaning" rule, the structure of their argument is essentially designed to outflank the self-evident proposition that where a statutory provision is to be construed, this Court should look first to the statute in question. Once the language, statutory purposes, legislative history, and agency interpretation of the CZMA are examined in any detail, it becomes evident that the construction of § 307(c)(1) adopted by the courts below is correct.¹⁸

A. Petitioners' Invocation of the "Plain Meaning" Rule Is Misguided

The starting place in every case involving construction of a statute is the statutory language itself. *Bowsher v. Merck & Co., Inc.*, 103 S.Ct. at 1587, 1591-92 (1983). However, this rule is not to be applied rigidly. As this Court recently held, the plain meaning rule is "rather an axiom of experience than a rule of law." *Watt v. Alaska*, 451 U.S. 259, 266 (1981) (quoting *Boston Sand Co. v. United States*, 278 U.S. 41, 48-49 (1928)); see also *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

The District Court properly held that the exact meaning of § 307(c)(1)'s threshold "directly affecting" language is neither clear nor unambiguous; the Act itself provides no definition of the phrase. DOI Pet. at 41a. As even a cursory review of this court's decisions demonstrates, the words "direct" and "directly" mean different things in different contexts, and a definition correct in one setting cannot be mechanically applied to another. Compare, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 307 (1936) ("direct" implies "proximate" causation) with *United States v. SCRAP*, 412

¹⁸Every court that has examined this issue so far has reached the same result. See *Conservation Law Foundation v. Watt*, 560 F. Supp. 561 (D. Mass. 1983), *appeals pending*, 83-1258 (1st Cir.) (Lease Sale 52); *Kean v. Watt*, No. 82-2420 (D.N.J., Oct. 8, 1982) (Reoffering Sale 2); *California v. Watt*, 17 E.R.C. 1711 (C.D. Cal., June 9, 1982) (Lease Sale 66).

U.S. 669, 687 (1973) (chain of causation with several intermediate links would "directly harm" plaintiff group and give it a "direct" stake in an Article III controversy) and *Bowsher v. Merck & Co., Inc.*, 103 S.Ct. at 1591-99 (policies underlying statutory phrase "directly pertain" informed judicial distinction between "direct" costs and "indirect" costs). Petitioners' strained arguments notwithstanding, the words "directly affecting" do not on their face present a self-defining standard whose "plain meaning" obviates recourse to the purposes, policies, history, and administrative interpretation of the CZMA.

In the District Court, petitioners offered a variety of definitions of the word "direct" from a dictionary. Ultimately, however, the "plain meaning" they assigned the term was a definition of their own making, which selectively combined those particular definitions that suited their purposes and ignored the rest. DOI Br. at 58a-59a. Continuing their semantic sophistry in this Court, petitioners argue that "conventional construction" of the term "directly" requires that the condition invoked shall operate "proximately" or "without any intervening agency, instrumentality or influence." DOI Br. at 21-22.

However, as the District Court correctly noted, tort concepts of "proximate" and "intervening" cause were created by the courts to *limit* tort liability and are irrelevant to a statute designed to *foster* intergovernmental cooperation and coordination in the management of coastal resources. *Id.* at 59a. Moreover, even assuming these tort concepts had been incorporated into the statute by Congress, the District Court properly concluded that their literal application would not alter its decision. *Id.* at 60a-61a.

Petitioners also cite the definitions of "direct" and "indirect" effects in the Council on Environmental Quality's regulations implementing the National Environmental Policy Act. WOGA Br. at 36-37; DOI Br. at 22 n.19. This reliance on a definition adopted by the agency without

any responsibility for interpreting the CZMA,¹⁹ defining an unrelated statute designed to serve different policies, and promulgated several years *after* the passage of the CZMA and the 1976 CZMA Amendments—indeed, after the California Coastal Management Program had been duly created by the state and approved by the federal government²⁰—is sorely misplaced. In fact, petitioners elsewhere acknowledge important differences between NEPA and CZMA review but fail to grasp their significance. WOGA's Reply Brief of Petitioners (on Petition for Certiorari) at 1-2, DOI Br. at 45-46. Precisely because § 307(c)(1) consistency review is substantive—not procedural, like NEPA review—foreseeable effects with extraordinary significance for the coastal zone should be reviewed as early as possible. In the words of the Senate Commerce, Science and Transportation Committee, § 307 (c)(1) review allows "Federal agencies . . . to conform their activities to State coastal zone management requirements *before* committing public resources to an effort which might be found to be inconsistent." S. Rep. No. 783, 96th Cong., 2d Sess. 10 (1980) (emphasis added). The CZMA goals of comprehensive coastal planning and maximal intergovernmental coordination would obviously be frustrated by disregarding the state coastal plan until the long-foreseeable effects of OCS development are so imminent that the state cannot adequately plan for them. *See* DOI Pet. at 46a.

In short, it is surely no departure from any "plain meaning" of § 307(c)(1) to say that the "direct" effects of a lease are the intended and foreseeable uses for which

¹⁹Curiously, at the same time that they seek to invoke these regulations implementing NEPA, they disregard the regulations implementing § 307(c)(1) that were adopted by NOAA, the one agency to which Congress gave CZMA responsibility. DOI Br. at 36-38. *See* discussion in Part E., *infra*.

²⁰The California Coastal Management Program was approved on November 7, 1977. The NEPA regulations cited by petitioners were issued Nov. 29, 1978. *See* 43 Fed. Reg. 58003 (1978).

the tract was leased—in this case, oil and gas development.²¹ The fact that intermediate approvals are required for the subsequent *private development* does not make the effects of the federal activity, the sale of leases, any less “direct.”²²

B. The Purposes and Policies of the CZMA Support the Lower Courts' Construction of Section 307(c)(1)

Precisely because the “directly affecting” clause is capable of various interpretations—because, that is, petitioners are wrong in asserting that the clause has one and only one obvious and self-defining “plain meaning”—a careful analysis of the CZMA's purposes and policies is in order.²³

²¹Petitioners also suggest that a “direct effect” under § 307(c)(1) must be “physical” as well as immediate. DOI Br. at (i), 2, 21; WOGA Br. at 12, 16, 26 n.19, 27. Such a suggestion not only is a fabrication out of whole cloth, but also is inconsistent with the language and policies of the CZMA addressing a wide range of coastal zone effects, including economic, social, demographic, cultural, residential, aesthetic, recreational, commercial, and industrial impacts. 16 U.S.C. §§ 1451-52.

²²This straightforward application of § 307(c)(1) to an OCS lease sale does not threaten to subject every other “federal activity”—however “indirect”—to consistency review, as petitioners imply. See, e.g., DOI Br. at 24-26. Thus, for example, if a federal agency were to impose a restriction on foreign oil imports, one might well hypothesize “effects” on a state's coastal zone from the resulting inducement for additional domestic OCS oil and gas production. However, that kind of effect is one which clearly operates “indirectly,” or, to use petitioners' terms, “mediately, remotely or collaterally”. Although DOI warns of the dire effects of accepting the lower courts' interpretation of “directly affecting,” its heroic efforts to drum up a parade of horrors are unpersuasive. In fact, the entire parade consists of a lone participant, a hypothetical involving coal leasing in Wyoming. DOI Pet. at 20 n.21, that is easily distinguishable from this case. See Brief in Opposition to Petitions for a Writ of Certiorari at 28 n. 37.

²³See *Bowsher v. Merck & Co., Inc.*, 103 S.Ct. at 1592 n.7, where this Court looked to the purposes underlying the statute in question to inform the meaning of the phrase “directly pertain,” a phrase that, like “directly affecting,” is not self-defining.

Such an analysis confirms the correctness of respondents' and the lower courts' common sense approach to the meaning of the clause.

The CZMA was enacted by Congress in 1972 because of the recognized need for increased protection of the natural, biological and physical resources of the coastal zone. The CZMA emphasizes the "[i]mportant ecological, cultural, historic, and esthetic values in the coastal zone," 16 U.S.C. § 1451(e), and states that population growth and economic development, including mineral extraction and fossil fuel development, "have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion." 16 U.S.C. § 1451(c).

In passing the Act, Congress was responding to national problems. The Senate Report emphasizes that passage of the Act was based on the following findings: that by 1964, over one quarter of the nation's salt marshes had been destroyed; that the commercial fishery of the United States depends on coastal and estuarine waters and marshlands as fish nursery areas and spawning grounds; that increased commercial and recreational demand in the coastal zone endangers biologic organisms; and that the fragmentation of state and local government authority in the coastal zone has exacerbated pressure for economic development. S. Rep. No. 753, 92d Cong., 2d Sess. 2-6 (1972). *See also* H. R. Rep. No. 1049, 92d Cong., 2d Sess. 10 (1972).

Underlying the whole congressional consideration was the recognition that existing statutes and institutions had been unable to curb the abuses of coastal resources. This is reflected in the specific finding in the CZMA that existing legal and institutional frameworks were inadequate to address the coastal problems facing the nation. 16 U.S.C. § 1451(h). In light of this finding, states were called upon to develop comprehensive programs to manage their coastal resources. The 1972 Senate Report specifically states that "[t]he intent of this legislation is to enhance state au-

thority by encouraging and assisting the states to assume planning and regulatory powers over their coastal zones." S. Rep. No. 753 at 1.

To induce the states to develop and implement comprehensive management programs, Congress provided that federal activities must be consistent with the approved programs. § 307(c), (d) of the CZMA; 16 U.S.C. § 1456(c), (d). This requirement is the principal permanent inducement to a state's development of a coastal management program. DOI Pet. at 43a-44a. It assures the state a central role in managing its coastline and prevents federal actions from undermining the state's plan once federally approved. Any interpretation of the phrase "directly affecting" in § 307(c)(1) must give due consideration to this central role the CZMA gives coastal states in planning for and managing development affecting their coasts. Unless states are involved in planning for such development, the comprehensive management programs that Congress found were needed to serve important national interests will be severely undermined."

C. The Legislative History of the CZMA Confirms the Lower Courts' Construction of Section 307(c)(1)

The legislative history of the CZMA overwhelmingly supports the Ninth Circuit's and the District Court's interpretation of § 307(c)(1). The CZMA was enacted in 1972, and amended in 1976 and 1980. In 1971, while favorably report-

"Also worthy of special note is § 303 of the 1972 CZMA:

The Congress finds and declares that it is the national policy . . . (c) for *all* Federal agencies engaged in programs *affecting* the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purposes of this chapter.

16 U.S.C. § 1452(c) (emphasis added). While modifying the language of § 303 in 1980, Congress specifically noted that the section as amended continues to support application of § 307(c)(1) to DOI's *OCS lease sales*. H.R. Rep. No. 1012, 96th Cong., 2d Sess. 35 (1980).

ing an earlier bill that would have required consistency for federal agency activities "in the coastal zone," the Senate Committee on Commerce declared:

[I]t is intended that any lands or water under federal jurisdiction and control, within or adjacent to the coastal estuarine zone, where the administering Federal agency determines them to have a functional interrelationship from an economic, social, or geographic standpoint with lands and water within the coastal and estuarine zone, should be administered consistent with approved State management programs.

S. Rep. No. 526, 92nd Cong., 1st Sess. 30 (1971); *see also id.* at 20. Foreshadowing the "directly affecting" standard that eventually was adopted as part of the 1972 CZMA, the above-cited language evinces a congressional intent that the federal agency consistency provisions be interpreted in a liberal, commonsensical, and *functional* way—not in a narrow and technical fashion as petitioners urge. This "functional interrelationship" formulation was subsequently adopted by the House Committee on Merchant Marine and Fisheries,²⁵ and has been quoted with approval and relied upon by NOAA in its consistency regulations.²⁶ It clearly supports the decisions of the courts below.

1972: The "directly affecting" language at the core of this case was first added by the 1972 Conference Committee. Prior to conference, both House and Senate versions spoke only of consistency for agency activities "in the coastal zone." In the face of this clear congressional choice to *expand* the agency consistency requirements, DOI curiously attempts to portray the conference substitution as a restrictive compromise "drafted to serve a limiting function." DOI Br. at 23-24.

According to DOI, the "directly affecting" substitution was the result of a decision to split the difference between

²⁵H. R. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980).

²⁶*See, e.g.*, 44 Fed. Reg. 37143 (1979).

the House and Senate definitions of the coastal zone in § 304. Federal lands had been excluded by definition from the coastal zone in the Senate Bill, but they were included in the House version. In conference, DOI suggests, the Senate coastal zone definition was retained in § 304, and the words "directly affecting" were inserted in § 307(c)(1) "to identify those activities on federal lands within the confines of a state's coastal zone that would be subject to the consistency requirements of the Act while at the same time excluding other activities from such requirements." *Id.* at 24. There are two serious problems with DOI's argument.

First, it logically proves too much. If, as DOI suggests, the "directly affecting" language was designed simply as a middle position between two definitions of the coastal zone, then areas completely outside the zone, such as the OCS, would be generically exempt. Yet this conclusion is inconsistent with DOI's position before the Ninth Circuit that § 307(c)(1) *does* apply to OCS pre-leasing activity.³⁷ Transcript of Oral Argument Before Ninth Circuit (January 15, 1982) at 10. In fact, later in its brief before this Court, DOI continues to suggest that it agrees with the Department of Justice's position that the applicability of § 307(c)(1) to an OCS lease is a question that cannot be answered generically but must be determined on a case-by-case basis. DOI Br. at 37 n.30; *see also* WOGA Br. at 26 n.19.

Second, DOI's argument that the phrase "directly affecting" was "drafted to serve a limiting function" is absolutely unsupported by the legislative history of the Conference Committee. Indeed, DOI admits as much.³⁸

"It is, of course, also at odds with the "plain meaning" of the language of the conference substitute, which evinces no hint that federal lands inside the coastal zone (as that zone had been defined by the House) are to be treated any differently from federal lands outside the zone; rather, the same threshold—"directly affecting"—was to apply to *all* federal activities wherever these occurred.

"In light of this concession, it is a mystery how DOI's position concerning the legislative intent of the clause is at all "evident." DOI Br. at 22.

DOI Br. at 23. Many changes, modifications, additions, deletions, and compromises were effected in conference, and it is only by a leap of faith that DOI can assert that the conferees' decisions concerning two distinct and unrelated sections of the CZMA, §§ 304 and 307(c)(1), were in any way connected.²⁹ DOI's historical revisionism notwithstanding, the District Court was correct in reading the language of the conference substitute as an *expansion* of the geographic scope of § 307(c)(1).³⁰

²⁹In discussing the 1972 legislative history, WOGA cites language from Senator Hollings on the Senate floor. WOGA Br. at 38. The Senator's comments, however, are obviously irrelevant to the meaning of "directly affecting" since they were delivered *before* the conference committee's expansion of the more restrictive language in the original Senate bill, which did limit federal consistency to activities in the coastal zone.

³⁰Moreover, the admittedly slender 1972 legislative history that *does* exist concerning the precise meaning of "directly affecting" supports the decisions of the lower courts. The most plausible account of the Conference Committee's choice to expand the provisions of § 307(c)(1) by substituting the words "directly affecting" is that such an expansion was intended to complement the conference's acceptance of similarly expansive language in § 307(c)(3). In the Senate bill, both (c)(1) and (c)(3) had the same geographical scope. When the conference committee instead adopted the House version of (c)(3), which applied to the issuance of federal licenses and permits "affecting land or water use in the coastal zone," it simultaneously adopted the "directly affecting" clause, so that once again the geographic scope of the two complementary consistency provisions—(c)(1) and (c)(3)—was roughly the same.

Such a reconstruction of the legislative intent is buttressed by the Conference Committee's suggestion of the relatedness of the two consistency provisions and their similar geographic thresholds: "As to the use of [federal lands not included within a state's coastal zone] which would *affect* a state's coastal zone, the *provisions* of section 307(c) would apply." H.R. Conf. Rep. No. 1544, 92nd Cong., 2d Sess. 12 (1972) (*emphasis added*). This history suggests that petitioners place too much emphasis on the differences between the (c)(1) and (c)(3) thresholds, *i.e.*, the importance of

In the end, the most that can be said on petitioners' behalf concerning the 1972 legislative history is that some ambiguity may exist regarding the meaning of "directly affecting." Any ambiguity, however, has subsequently been eliminated by regular and consistent congressional declarations supporting the applicability of § 307(c)(1) to OCS lease sales.

1974: In 1974, a print released by the Senate Committee on Commerce specifically cited the CZMA as one of "several Federal statutes [that] collectively establish a legal and administrative system for the management and control of outer continental shelf oil and gas development."¹¹ In another passage describing the CZMA regime in detail, the print reads:

States that adopt management programs consistent with Federal guidelines gain additional leverage in dealing with the Federal government[.] Federal activities, or those licensed by the Federal government

"directly" as a restrictive qualifier. DOI Br. at 21, WOGA Br. at 35. See also n.24, *supra*.

We do not contend here that the thresholds for (c)(1) and (c)(3) are identical, because the language of the two provisions does differ, and, where possible, every word of a statute should be given effect. *Bowsher v. Merck & Co., Inc.*, 103 S. Ct. at 1593. We do contend, however, that petitioners' overly restrictive and technical reading of "directly" is unwarranted in light of the expansive purpose that these sources indicate underlie the insertion of the phrase "directly affecting the coastal zone."

In contrast to *Bowsher*, where the word "directly" was specifically introduced as an amendment to *restrict* the pre-existing statutory phrase "pertaining to," here the phrase "directly affecting" was specifically introduced to *expand* earlier statutory language.

¹¹Outer Continental Shelf Oil and Gas Development and the Coastal Zone, *supra*, n.4, at 55 (emphasis added). Specifically noting the CZMA's requirement of "consistency of Federal programs," the report goes on to declare:

The Secretary of the Interior is authorized to grant oil and gas leases on the shelves and is also responsible for administering the leases including prescribing the rules necessary for regulat-

that affect a state's coastal zone must in general, be consistent with the State's approved management program. This gives the States influence in dealing with the Federal government where differences of opinion exist concerning proposed Federal actions that would affect the coastal zone. OCS development is regarded as among the most significant Federal actions affecting the Coastal Zones.

Id. at 79. Thus, both § 307(c)(1), governing "Federal actions," and (c)(3), regulating "those licensed by the Federal government," were viewed as applicable to OCS development, in the broad sense of that term, *i.e.*, opening the OCS to commercial exploitation.

1975: The following year, in favorably reporting its version of amendments to the CZMA, the Senate Commerce Committee noted:

There is very little coordination or communication between Federal agencies and the affected coastal States prior to major energy resource development decisions, *such as the decision to lease* large tracts of the OCS for oil and gas development. . . . Full implementation of the Coastal Zone Management Act of 1972 and recognition of its capability to solve energy-related conflicts could go far to institute the broad objectives of Federal-State cooperative planning envisioned by the framers of the act.

S. Rep. No. 277, 94th Cong., 1st Sess. 3 (1975), *reprinted in* 1976 U.S. Code Cong. & Ad. News 1770 (emphasis added). Pointing out that "States are likely to be significantly affected—economically and otherwise—by Federal leases for oil exploration and production on adjacent OCS

ing oil and gas development in a manner consistent with Acts listed above.

Id. at 55-56 (emphasis added). Since this passage speaks of the obligations of the Secretary of the Interior himself, and not of private applicants, it can only refer to the applicability of § 307 (c)(1) to the OCS leasing process.

lands," *id.* at 11, the Report goes on to discuss the applicability of the CZMA consistency measure to the OCS:

Section 307 is the portion of the Act which has come to be known as the "Federal consistency" section. It assures that once State coastal zone management programs are approved and a rational management system for protecting, preserving and developing the State's coastal zone is in place (approved), the *Federal departments, agencies and instrumentalities* will not violate such a system but will, instead, conduct themselves in a manner consistent with the State's approved management program. *This includes conducting or supporting activities in or out of the coastal zone which affect that area.*

Id. at 36-37 (emphasis added). The last sentence is an unambiguous reference to the provisions of § 307(c)(1), using, as it does, the "conducting or supporting" language of that section. This discussion continues by describing the provisions of § 307(c)(3) and concludes with the following passage demonstrating that *both* (c)(1) and (c)(3) apply to the OCS:

[T]he law already provides an effective mechanism for guaranteeing that Federal activities, *including* those supported by, and those carried on pursuant to, Federal authority (license, lease, or permit) will accord with a rational management plan for protection, preservation and development of the coastal zone. One of the specific federally related energy problem areas for the coastal zone is, of course, the potential effects of *Federal activities* on the Outer Continental Shelf beyond the state's coastal zones, *including* Federal authorization for non-Federal activity, but *under the act as it presently exists*, as well as the S. 586 amendments, if the activity may affect the State coastal zone and it has an approved management program, the *consistency requirements do apply.*"

Id. at 37 (emphasis added). "Federal activities" are governed by (c)(1); "non-federal activities" carried out pur-

suant to federal authorization are subject to (c)(3). Both sections were designed to apply to the OCS "if the activity may affect the State coastal zone." *Id.*³²

The House Report is also illuminating:

[T]he Committee wants to assure coastal states in frontier areas that the OCS *leasing process* is indeed a *federal action* that *undoubtedly* has the potential for affecting a state's coastal zone and, hence, must conform with approved state coastal management programs. . . . Given the obvious impacts on coastal lands and waters which will result from the federal action to permit exploration and development of offshore petroleum resources, it is difficult to imagine that the original intent of the Act was not to include such a major federal coastal action within the coverage of "federal consistency." . . . One major encouragement [to coastal states] has been the belief that in the future, the impacts which flow from federal Outer Continental Shelf leasing will have to conform to state and local prescriptions about the best location for energy support and industrial facilities. The Committee be-

³²DOI is thus simply wrong when it asserts that "no one suggested that the consistency provision of section 307(c)(1) applied to lease sales." DOI Br. at 33. In addition to the references to (c)(1) applicability in the Committee report discussed *supra*, clear and unambiguous statements of (c)(1)'s applicability appear in Congressional Research Service, "Effects of Offshore Oil and Natural Gas Development on the Coastal Zone, A Study Prepared for the Ad Hoc Select Committee on Outer Continental Shelf," 94th Cong., 2d Sess. 93 (Comm. Print 1976) (hereinafter cited as "Effects"); Oceans Programs, Office of Technology Assessments, "Offshore Oil and Gas Development, A Study for the Ad Hoc Select Committee on Outer Continental Shelf," 95th Cong., 1st Sess. 155-157 (Comm. Print 1977) (hereinafter cited as "Offshore Oil"); H. R. Rep. No. 590, 95th Cong., 1st Sess. 153 n.52 (1977); 15 C.F.R. § 930.71 (comment), 44 Fed. Reg. 37154 (1979); S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980); H. R. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980); H. R. Rep. 269, 97th Cong., 1st Sess. 14 (1981) (Additional Views of Congressman Studds and d'Amours).

lieves it would break faith with the states not to state plainly its clear intent to include major federal actions as Outer Continental Shelf leasing under the "federal consistency" section.

H. R. Rep. 878, 94th Cong., 2d Sess. 37, 52-53 (1975) (emphasis added).

1976: Petitioners make much of the fact that in Conference, Congress decided not to insert the word "lease" into § 307(c)(3), but instead adopted the provisions of what is now § 307(c)(3)(B). DOI Br. at 31-35; WOGA Br. at 40-42. Their argument is fundamentally misconceived. As discussed in more detail in Part IV.B., *infra*, Sections (c)(1) and (c)(3) contain different statutory language, apply to different actions, establish different consistency standards, and address different parties. The most that can be said of the Conference Committee's substitution of § 307(c)(3)(B) is that the *applicant* for a federal OCS lease does not have to engage in a § 307(c)(3)(A) consistency determination before obtaining the lease. But as both the Justice Department and the District Court have noted, petitioners' argument that the passage of § 307(c)(3)(B) somehow displaces § 307(c)(1) must be rejected as an impermissible repeal by implication. DOI Pet. at 48a; Department of Justice Opinion, J.A. 42, Cal. Exh. L-15,³³ see *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974). In addition, petitioners' assertion completely contradicts their concessions elsewhere that § 307(c)(1) does apply to federal OCS lease sale decisions.³⁴

³³NOAA's regulations are in accord: Non-OCS leases *are* subject to § 307(c)(3)(A), OCS leases are not, and DOI's pre-lease activity is subject to (c)(1). 15 C.F.R. § 930.51(a) (comment), 44 Fed. Reg. 37150 (1979); 15 C.F.R. § 930.71 (comment), 44 Fed. Reg. 37154 (1979).

³⁴Two further points are in order concerning the 1976 legislative history. First, the history of the (c)(3) amendments highlights the error of petitioner WOGA's insistence that a statutory provision must be accompanied by a "clear statement" that it applies to

1980: In 1980, Congress conducted a comprehensive examination of the CZMA and enacted the Coastal Zone Management Improvement Act of 1980.³⁵ As both houses were aware of the dispute between California and DOI over the meaning of the "directly affecting" clause and the applicability of § 307(c)(1) to OCS leases, both Committee Reports specifically and carefully addressed those issues, sending the parties and the courts a distinctively clear message:

The Department of the Interior's activities which preceded lease sales [are] *to remain* subject to the requirements of section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development *commences* at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone. Coordination

DOI's OCS activities. *No one* in Congress in 1976 doubted that with the insertion of the word "lease," § 307(c)(3) would apply to OCS leases. Second, and relatedly, the House and Senate Reports and Floor debates clearly demonstrate Congress' belief that even *without* the addition of the word "lease," (c)(3) applied to OCS leases. Insertion of the word "lease" was a "technical" amendment, a "clarification" of "our original congressional intent." S. Rep. No. 277 at 19, 36; H. R. Rep. 878 at 52-53; 122 Cong. Rec. 23053 (comments of Sen. Hollings), 23084 (comments of Sen. Williams) (1976). The various congressional statements obviously contradict WOGA's assertion that

there is no basis in the CZMA or OCSLA for believing that Congress, at any time when it originally enacted those statutes or subsequently amended them, contemplated that the Secretary of the Interior's selection of OCS tracts for leasing would in any respect be influenced by state CZMA programs.

WOGA Br. at 20; *see also id.* at 32 n.25; DOI Br. at 20, 34 n.28.

³⁵The House Oceanography Subcommittee alone "conducted nine oversight hearings, solicited testimony from some 300 groups and individuals, and received over 2,000 pages of testimony." H. R. Rep. No. 269, *supra*, n.32, at 12.

must *continue* during the critical exploration, development, and production stages.

S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980) (emphasis added).

The [changes wrought in 1976] did not alter Federal agency [i.e., § 307(c)(1)] responsibility to provide states with a consistency determination related to *OCS decisions which preceded issuance of leases*. . . .

H. R. Rep. No. 1012, 96th Cong., 2d Sess. 28 (1980) (emphasis added).³⁰

³⁰WOGA seeks to avoid the obvious impact of this House Report by arguing that the report "observed that the 1972 Act gave the States 'no part in any decision concerning development'" on the OCS. WOGA Br. at 43. WOGA's reading of the inner-quoted language is, however, obviously unsupportable in light of the House's clear statement only two pages later that § 307(c)(1)—passed as part of the 1972 Act—*does* apply to OCS lease sales. H. R. Rep. No. 1012 at 28. *See also* n.34, *supra*. Although the 1980 passage WOGA cites is hardly a model of clarity, a careful examination of the passage and its context demonstrates the error of WOGA's reading.

The immediate antecedent of the clause WOGA cites is not the 1972 CZMA, as WOGA implies, but rather this court's decision in *United States v. Maine*. The passage cited is therefore best understood as simply restating the holding of *Maine*: "the States [*ex proprio vigore*] would have no part in any decision concerning the development on the [OCS] nor would the States [*ex proprio vigore*] benefit from any lease bonuses or royalties." H. R. Rep. No. 1012 at 26-27. As is clear from the House Report at 28, the 1972 CZMA had already addressed the first prong of the *Maine* holding concerning coastal state participation in OCS decisionmaking by making certain coastal states with federally-approved plans federal agents delegated with power to implement a national policy of coastal zone protection. The 1972 Act had not, however, addressed the second prong of *Maine*—the issue of OCS royalties. The "problem" in *Maine's* wake, resolved by the 1976 CZMA Amendments and referred to in the 1980 House Report passage WOGA cites, *id.* at 26, is that coastal states would receive none of the proceeds of OCS royalties and thus had no funds to deal with the very real coastal impacts of offshore oil development. The House Report thus continues: "Under those

Embracing the 1971 "functional interrelationship" formulation, the House Report goes on to list the benefits of a liberal application of "directly affecting":

First, it fosters consultation between Federal and State agencies at the earliest practicable time. This, in turn, enhances the ability of the States to plan for and manage the coastal zone effects which are directly linked to Federal activities. It also allows Federal agencies to avoid the irretrievable commitment of resources for Federal activities likely to lead to results inconsistent with the requirements of approved state programs. Secondly, broad opportunities for States to influence Federal activities enhances the incentive of the consistency provisions, thereby reinforcing voluntary State participation in the national program. Finally, an expansive interpretation of the ["directly affecting"] threshold test is compatible with the amendment to section 303 calling for Federal agencies and others to participate and cooperate in carrying out the purposes of the act.

Id. at 34-35.³⁷

1981: In 1981, the House Committee again reiterated its view by reporting out a resolution specifically dis-

circumstances, efforts to amend the Coastal Zone Management Act of 1972 were initiated." The 1976 CZMA Amendments created a coastal energy facility impact program that provided funding to address this problem.

³⁷Petitioner DOI cites a remark by Congressman Studds, Chairman of the House subcommittee, on the floor of the House but misrepresents its true significance. DOI Br. at 40. When Congressman Studds was questioned about the language of the 1980 report and replied that it was not intended to "modify the term directly affecting," he was simply restating the fact that the 1980 report was in perfect harmony with original congressional intent and every subsequent congressional declaration. 126 Cong. Rec. H.10111-12 (daily ed. Sept. 30, 1980). Our reading is supported by Congressman Studds' written comments the following year, which are found at H.R. Rep. No. 269, *supra*, n.32, at 11-15.

approving a NOAA regulation defining "directly affecting" in a narrow and technical manner—indeed, "in a way more nearly consistent with, if not identical to, that urged" by petitioners.³⁸ DOI Pet. at 17a. A resolution of disapproval was also introduced in the Senate but both resolutions were mooted when NOAA withdrew the offensive regulation. 47 Fed. Reg. 4231 (1982).

The CZMA thus offers a decade of consistent and convincing legislative history. Year after year, Congress has affirmed and reaffirmed its intention that "directly affecting" be broadly construed and, more specifically, that § 307(c)(1) be applied to DOI's OCS lease sales and pre-lease activities.

D. The Decisions of the Lower Courts in No Way Conflict with, but Are in Fact Strongly Supported by, the Legislative History of the OCSLA

Ultimately, it is ironic that petitioners persist in their effort to read the CZMA through the lens of the OCSLA instead of looking properly to the CZMA first to understand the scheme of cooperative federalism the statute at issue establishes. For despite the fact that the OCSLA is not the correct source to consult in the first instance for the proper construction of § 307(c)(1), it is evident that the legislative history of the OCSLA offers additional support for the decisions of the lower courts. Indeed, some of the clearest statements of DOI's obligation to render a § 307(c)(1) consistency determination at the OCS lease sale stage appear in OCSLA legislative history.³⁹

³⁸See H.R. Rep. No. 269, *supra*, n.32, at 6.

³⁹As early as 1975, the applicability of § 307(c)(1) to OCS leasing was understood by the Senate Committee on Interior and Insular Affairs. In its 1975 Report, the Committee indicated that it "had the benefit of" the Commerce Committee print, "Outer Continental Shelf Oil and Gas Development and the Coastal Zone"—a print that, as discussed *supra* at 28-29, affirms that DOI's OCS-related activities are governed by the CZMA consistency requirement for "Federal activities . . . that affect a state's coastal zone," i.e., § 307(c)(1). See S. Rep. No. 284, 94th Cong., 1st Sess. 23 (1975).

In March 1976, the House Ad Hoc Select Committee on the Outer Continental Shelf released a committee print which had been prepared pursuant to the request of Chairman John Murphy. This committee print unequivocally affirms CZMA's applicability to OCS development: The 1972 CZMA is referred to as "major legislation with a major impact on OCS development." "Effects," *supra*, n.32, at 8 (emphasis added). Pointing out that the OCSLA "does not stand alone in administering the OCS, [but] must be read in conjunction with other laws," the document notes the application of § 307(c)(1) to the OCS, quoting its language, and notes:

Although at the present time there are no approved management programs, if and when such programs are approved, OCS leasing and the resulting activity *will* need to be reconsidered in light of the State's efforts to manage their coastal margins under their approved programs.

Id. at 93 (emphasis added). A later passage explains:

The [CZMA] requires a reordering of the Federal role to respond to the State guidelines rather than transmitting guidelines from Washington. . . . OCS development is regarded as among the most significant Federal actions affecting the Coastal Zones.

Id. at 228-29.⁴⁰

Two months later, the House Committee released its report on OCSLA amendments. The report specifically cites the CZMA as a statute having "application to OCS areas and operations," H.R. Rep. No. 1084, 94th Cong., 2d Sess. 51 (1976), and goes on to list the "OCS-related responsibilities," of the Commerce Department as follows:

The Coastal Zone Management Act of 1972 authorizes the Secretary of Commerce to provide grants-in-aid

⁴⁰Moreover, the print devotes an entire appendix to a catalogue of provisions of the California Coastal Plan (then pending federal approval) that might be applicable to the OCS. *See id.*, Appendix XXIII.

to coastal states to encourage the establishment of management programs for uses of land and water in coastal areas, *and to require consistency of federal programs with approved state plans.*

Id. at 52 (emphasis added).

In 1977, the Murphy Committee released another print that further illuminates the Committee's understanding of the relationship between the CZMA consistency provisions and OCS lease sales. The language of the print is crystal-line:

Under the 1972 Act, OCS leasing must be conducted in a manner which is "to the maximum extent practicable" consistent with approved State management plans. Under 1976 amendments to the Act, exploration and development permits are subject to a limited veto by the States as explained below.

Much of the confusion about Federal consistency stems from the fact that there are two standards of consistency provided for in the CZM Act. The first standard of consistency *does* apply to leasing, but it is the less strict of the two standards. Section 307(c)(1) and (2) provide that Federal agencies will conduct or support activities and development projects which will effect [sic] the coastal zone in a manner which is consistent with State CZM programs "to the maximum extent practicable." The Federal agency itself decides whether or not its activities are consistent with state programs.

"Offshore Oil," *supra*, n.32, at 155 (emphasis in original).

The 1977 House Report on OCSLA Amendments echoes the view of its earlier committee prints; indeed, the prominent favorable citations of the two above-quoted prints virtually incorporate them by reference into the Committee Report. *See, e.g.*, H.R. Rep. No. 590, 95th Cong., 1st Sess. 55 n.l., 57 n.10, 58 n.22, 74 n.27. The Report specifically notes the relevance for the OCS of the CZMA requirement "for consistency of federal *programs* with approved

plans." *Id.* at 58 (emphasis added). In discussing Subsection 18(f) of the proposed OCSLA Amendments, the Committee indicated its belief that the "consistency requirement established pursuant to the Coastal Zone Management Act of 1972" would constrain DOI; since CZMA § 307(c)(3)(B) addresses private applicants, this discussion can only refer to § 307(c)(1). Finally, and most important, the Committee affirmed in no uncertain terms its awareness—an awareness doubly confirmed by the earlier committee prints—that, under the CZMA, "certain OCS activities, *including lease sales* and approval of development and production plans must comply with 'consistency' requirements as to coastal zone management plans approved by the Secretary of Commerce." *Id.* at 153 n.52 (emphasis added). The Committee went on to stress that nothing in the proposed OCSLA Amendments "is intended to alter procedures under [the CZMA] for consistency once a State has an approved Coastal Zone Management Plan." *Id.* This intention, of course, was formalized in the OCSLA savings clause, 43 U.S.C. § 1866(a).

In the end, the combined legislative histories of the CZMA and OCSLA present a compelling pattern of congressional pronouncements supporting the decisions of the lower courts. Congress has spoken not once or twice, but time and time again. Each time, its words confirm the correctness of the lower courts' holdings.

The legislative history we present is entitled to substantial weight. Not only is it entirely consistent with the language, purposes, and policies of the CZMA, but it also represents a consistent series of congressional declarations regarding the very issue in this case: the applicability of § 307(c)(1) to DOI's OCS lease sales. The earlier declarations are noteworthy because they emerged from committees with CZMA and OCSLA oversight engaged in enacting or amending legislation related to the consistency provisions of the CZMA. Later declarations are entitled to significant weight because they illuminate, confirm, and

clarify original intent,⁴¹ and were rendered in the context of a comprehensive review of the CZMA with specific awareness of the disagreement between DOI and coastal states over the meaning of § 307(c)(1). Moreover, when added to NOAA's interpretation of the consistency requirements of § 307(c)(1) (to which we turn next), these later declarations have given rise to substantial reliance by coastal states considering voluntary participation in the CZMA program.

E. The District Court's Holding Is Supported by the National Oceanic and Atmospheric Administration's Longstanding Interpretation of Section 307(c)(1)

It is a settled principle that an agency's interpretation of a statute that it is assigned by Congress to implement is normally entitled to deference from the courts. *Train v. Natural Resources Defense Council*, 421 U.S. 60, 87 (1975). The National Oceanic and Atmospheric Administration is the agency within the Department of Commerce charged with the responsibility for promulgating regulations under the CZMA. NOAA's longstanding interpretation of § 307(c)(1) is that the Secretary of the Interior's lease sale decisions do directly affect the coastal zone and thus require a consistency determination.

In 1977, in its proposed rules on the § 307 federal consistency requirements, NOAA stated:

NOAA is considering a position which treats the Department of the Interior's *pre-lease sale decisions, such as tract selections and choice of lease stipulations*, as a 'Federal activity' subject to the requirements of Section 307(c)(1) of the Act . . . This proposal would re-

⁴¹To the extent the 1971 and 1972 legislative history is slender and not dispositive of the issues in this case, subsequent legislative history can offer this Court an invaluable aid in its search for legislative intent. Since no state had an approved coastal plan until 1977, later congressional pronouncements may well be more focused than early ones. See *Andrus v. Shell Oil Co.*, 446 U.S. 657, 667 n. 8 (1980); *Seatrains Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 596 (1980); *Bell v. New Jersey*, 103 S. Ct. 2187, 2194 (1983).

quire the Secretary of the Interior to initiate such decisions in a manner consistent to the maximum extent practicable with approved coastal management programs when those decisions would directly affect the coastal zone.

42 Fed. Reg. 43591 (1977) (emphasis added). NOAA's test under the various consistency subsections—§ 307 (c)(1), (c)(2), and (c)(3)—was "significance." *Id.* at 43590.

In 1978, NOAA finalized the rules and stated that the legislative history on consistency demonstrated that § 307 (c)(1) (as well as (c)(2) and (c)(3)) was intended to apply to "all Federal actions which were capable of significantly 'affecting the coastal zone.'" 43 Fed. Reg. 10511 (1978).

In 1979, the Department of Justice took issue with NOAA's conclusion that the same test could be applied to different subsections of § 307. April 20, 1979, Department of Justice Opinion Letter, J. A. 46, Cal. Exh. L-15. However, the Justice Department expressly agreed with NOAA that DOI's pre-leasing activities are subject to the consistency requirements of § 307(c)(1). *Id.* at 42-43.

In response to the Justice Opinion, NOAA deleted the definition of "directly affecting" as "significantly affecting" in its final 1979 regulations. 44 Fed. Reg. 37142 (1979). However, it reiterated the view, confirmed by the Justice Department, that:

Accordingly, *section 307(c)(1) of the CZMA applies to DOI's OCS prelease sale activities directly affecting the coastal zone.* . . . Implementation of this requirement at the OCS prelease sale stage should lead to minimization of adverse coastal environmental and socioeconomic impacts, thereby reducing conflicts with affected States and avoiding delay in the exploitation of offshore energy resources.

44 Fed. Reg. 37142 (1979) (emphasis added); *see also* 15 C.F.R. § 930.71 (comment), 44 Fed. Reg. 37154 (1979).

NOAA's regulations stress liberal construction of the threshold test to favor inclusion of federal actions subject

to consistency review. 44 Fed. Reg. 37143; *see also* 15 C.F.R. § 930.34(b). Moreover, the regulations state that federal activities which involve the "disposal of land or water resources" are specifically included within the consistency provisions of § 307(c)(1). 15 C.F.R. § 930.31(b).

In a March 23, 1979 memorandum entitled "Application of CZMA Section 307(c)(1) Consistency Requirement to Interior's Pre-Lease Sale Activities," J.A. 48-62, Cal. Exh. L-14, NOAA stated that the principles of statutory construction demonstrate that DOI's position is incorrect and that § 307(c)(1) does apply to Interior's pre-lease sale activities. The memorandum states that "the agency responsible for implementation of the CZMA, NOAA, has, in fact pointedly continued to assert the clear applicability of the statutory language." *Id.* at 58. In addition, the memorandum explicitly supports application of § 307(c)(1) to Interior's tract selection and lease stipulation decisions. *Id.* at 60-62.

This view was reiterated on April 9, 1980, when NOAA stated:

In our view *Federal consistency requirements subject final notice of OCS sales to consistency determinations.* The critical decision point in the OCS process influences tracts to be selected and stipulations to be imposed and thus sets in motion actions which will invariably affect coastal resources.

April 9, 1980 NOAA Letter to State Coastal Management Program Directors, C.R. 3, Cal. Exh. L-16 (emphasis added).

NOAA's longstanding interpretation obviously supports the application of § 307(c)(1) to the Secretary's OCS lease sales.⁴²

⁴²For a brief time in 1981, NOAA changed its interpretation. However, adverse reaction from Congress and the coastal states led NOAA to reject the Interior Department's approach—the same approach pressed by the Secretary in this case. *See* DOI Pet. at 17a-18a, 57a-58a. This short-lived narrow definition is entitled to no weight. *Id.* at 18a, 57a-58a.

IV

LEASE SALE 53 AS PROPOSED WOULD DIRECTLY AFFECT THE COASTAL ZONE OF CALIFORNIA, AND, THUS, THE DEPARTMENT OF THE INTERIOR MUST COMPLY WITH THE REQUIREMENTS OF § 307(c)(1) PRIOR TO THE SALE OF LEASES

In the foregoing, we have established the clear intent of Congress in enacting § 307(c)(1) of the CZMA that this section apply to DOI's proposed OCS oil and gas lease sales. All that remains to be demonstrated is that the particular lease sale in question, Lease Sale 53, directly affects California's coastal zone, that is, that the lease sale initiates a series of events that have consequences in the coastal zone or, to use the alternative formulation, that it has a functional interrelationship with lands and waters in the coastal zone from an economic, geographic, or social standpoint. DOI Pet. at 15a. As will be shown, Lease Sale 53 plainly meets these definitions; therefore, DOI must comply fully with the requirements of § 307(c)(1) and its implementing regulations in order to fulfill Congress' intent. To postpone application of consistency requirements to the later exploration and development-production phases of the OCS oil and gas process, as DOI and WOGA suggest, would deny states the opportunity ever to review the conformity of the lease sale in its entirety with the state's federally-approved coastal program and thereby would greatly undermine the scheme of cooperative federalism Congress envisioned in enacting the CZMA. DOI Br. at 28-30, 41-49; WOGA Br. at 21-32.

A. Lease Sale 53 Directly Affects the California Coastal Zone

The courts below canvassed the direct effects of Lease Sale 53 on the coastal zone of California with great clarity. Judge Sneed, writing for the unanimous Ninth Circuit panel, discussed those effects as follows:

We agree that the lease sale in this case directly affects the coastal zone. These direct effects of Lease

Sale 53 on California's coastal zone are detailed by the district court. We need not repeat them here. It is enough to point out that *decisions made at the lease sale stage in this case establish the basic scope and charter for subsequent development and production*. Prior to the sale of leases, critical decisions are made as to the size and location of the tracts, the timing of the sale, and the stipulations to which the leases would be subject. These choices determine, or at least influence, whether oil will be transported by pipeline or ship, which areas of the coastal zone will be exposed to danger, the flow of vessel traffic, and the siting of on-shore construction.

Under these circumstances Lease Sale 53 established the first link in a chain of events which could lead to production and development of oil and gas on the individual tracts leased. This is a particularly significant link because at this stage all the tracts can be considered together, taking into account the cumulative effects of the entire lease sale, whereas at the later stages consistency determinations would be made on a tract-by-tract basis under section 307(c)(3). The narrow definition of "directly affecting" urged upon us by the federal appellants would diminish the ability of the state to protect its coastal zone and to influence activities that were set in motion at the lease sale stage.

DOI Pet. at 12a-13a (emphasis added; citations omitted). As noted by the appellate court, the District Court provided a lengthy, though scarcely exhaustive, list of specific direct effects of Lease Sale 53 on the California coastal zone. DOI Pet. at 62a-65a; *see also id.* at 45a-46a.

The lower courts' assessments are obviously correct. The decisions made in anticipation of Lease Sale 53 do establish "the scope and charter" for all subsequent oil and gas activities on the tracts offered. As Lease Sale 53 is a frontier OCS sale, the pre-leasing decisions demarcated

the area newly to be opened to petroleum development and, consequently, determined the particular expanse of the California coast that could be affected by the sale. The tracts in controversy are in close proximity to California's coastal zone, beginning just beyond the three-mile marine limit of that zone. DOI Pet. at 39a. The stipulations that will attach to leases and control numerous of the lessees' activities throughout the life of those leases were formulated prior to the proposed sale date. Final Environmental Impact Statement for Lease Sale 53, C.R. 19, DOI Exh. L-B at 1-40. It is difficult to imagine federal activities that more clearly have a direct effect on the California coastal zone than these pre-leasing decisions by DOI.

B. It Is Both Logical and Necessary To Conduct a Consistency Determination Pursuant to § 307(c)(1) at the Lease Sale Stage

Despite the abundance of identifiable direct effects of Lease Sale 53 on California's coast, the petitioners attempt to portray the performance of a consistency determination at the lease sale stage as an impossible exercise because of the lack of specific information at that stage and therefore urge that consistency requirements cannot attach to OCS oil and gas operations until the exploration and development-production phases.⁴³ DOI Br. at 28-30; WOGA Br. at 27-31. However, as we have previously seen, Congress contemplated that the provisions of § 307(c)(1)

⁴³In its Statement of the Case, WOGA also attempts to portray California's coastal management program as too vague to provide the basis for a finding of inconsistency at the leasing stage of Lease Sale 53. WOGA Br. at 7-10. WOGA's characterization conveniently glosses over DOI's failure to provide a consistency determination canvassing the numerous relevant provisions of the California Coastal Management Program, which would have allowed the California Coastal Commission a formal opportunity to respond and state its disagreements based on its interpretations of the provisions of the Program. 15 C.F.R. §§ 930.41-42. Rather, WOGA dwells upon the Commission's citation of two provisions of the Program in an

would apply at the lease sale stage. A common sense appraisal of what a consistency determination can accomplish at that stage, as opposed to consistency certifications of individual lessees' exploration or development-production plans at those later stages, underscores the logic of Congress' application of § 307(c)(1) to lease sales.

Only if the provisions of § 307(c)(1) are applied to DOI at the lease sale stage will *DOI's activity as a whole* ever be adequately measured against the provisions of affected coastal states' management programs. The consistency provisions of § 307(c)(3)(B), which the petitioners claim obviate the need for (c)(1) applicability at the lease sale stage, simply cannot perform this function, as is apparent from the very terms of that subsection.

First, § 307(c)(3)(B) applies not to the activities of DOI but to those of the lessee. Thus, under § 307(c)(3)(B), such critical actions by DOI as the choice of tracts to be offered and the formulation of standard lease stipulations cannot be examined directly by the state at the outset of the leasing process but only tangentially as these decisions are reflected in individual lessees' actions.

Further, the exploration and development-production plans to which § 307(c)(3)(B) applies, and the consistency certifications that must accompany them, are submitted individually by the various lessees at different times throughout the lease terms.⁴⁴ Were § 307(c)(3)(B) the sole

ad hoc resolution in protest of DOI's refusal to perform a consistency determination as evidence of the Program's vagueness. This resolution certainly does not represent any final finding or interpretation by the Coastal Commission of the extent to which, and the manner in which, Lease Sale 53 may be inconsistent with the California program. That must await the DOI's consistency determination.

⁴⁴The Affidavit of Mari Gottdiener, California Coastal Commission, July 1, 1981, and Exhibits 1 and 2 thereto, J.A. 152-55, illustrate well the sporadic filing of consistency certifications by lessees for proposed exploration and development-production plans. These documents reveal that intermittently over a two-and-a-half year

means of consistency review, generic problems with a particular lease sale vis-a-vis the state's coastal program could only be dealt with on a tract-by-tract basis. Such an approach would be inefficient,⁴⁵ as well as unfair to the lessee, who should not have to bear the burden of addressing consistency problems that result from generic decisions by DOI. Such problems should be ironed out between DOI and the state coastal management agency at the outset.

Finally, consistency review on the piecemeal basis provided by § 307(c)(3)(B) would effectively preclude states from ever meaningfully evaluating and responding to the cumulative impacts of DOI's OCS lease sales on their coastal zones. While activities on any single tract might not be inconsistent with the terms of the state's management program, the aggregate effects of such activities on a number of tracts in a particular region could be wholly inconsistent with that program. Only by examining the sale as a whole pursuant to § 307(c)(1) can its cumulative impacts be adequately assessed.

Thus, there is no merit to petitioners' related arguments that the phased nature of OCS decisionmaking under the OCSLA eliminates the need for a consistency determination at the lease sale stage. DOI Br. at 27-30; WOGA Br. at 21-32. As we have just shown, logic supports the application of the § 307(c)(1) consistency requirements to DOI at the lease sale stage so that generic and cumulative inconsistencies of a proposed sale with a state's CZMA program can be avoided by the federal agency itself at the outset.

period, twenty-seven consistency certifications for such plans for tracts in the Santa Barbara Channel were submitted to the California Coastal Commission for its concurrence.

⁴⁵While petitioners give lip service to avoidance of judicial economies, DOI Pet. at 18-20; WOGA Br. at 45-46, their suggestions that § 307's consistency requirements are not to be applied until the exploration and development-production phases are to the contrary. Litigation over consistency is hardly likely to decrease if all consistency problems, generic as well as particular, must be resolved on a tract-by-tract basis.

As the D.C. Circuit has recognized, the OCSLA process is "pyramdic in structure," proceeding by stages from broad national planning to specific lease sale planning to the peculiarities of individual exploration and development-production plans. *California v. Watt*, 668 F.2d 1290, 1297 (D.C. 1981). The mere fact that more concrete information will be available in the final phases involving approval of lessees' tract-specific plans does not render an examination at the outset of the overall consistency of a lease sale proposal with the adjacent state's coastal management program premature or unnecessary. The very fact that DOI can make decisions on which tracts to offer and what lease stipulations to apply based on the information available at the pre-lease phase belies any assertion that there is insufficient information at that stage to address a state's sale-wide consistency concerns. The pyramdic structure of the leasing program militates in favor of application of consistency requirements at the lease sale stage: As the pyramid narrows in later phases, opportunities to address broad issues will have been lost.

The petitioners' citations to other statutory schemes as applied to OCS leasing are not to the contrary.⁴⁶ *County*

⁴⁶Nor are the provisions of the 1978 OCLA Amendments that allow a degree of secretarial control over OCS leases after their issuance at all indicative of a congressional intent that § 307(c)(1) not apply to OCS lease sales. DOI Br. at 30; *see also* WOGA Br. at 27-31. First, applying as they do to individual leases, these provisions are not designed to address the cumulative and generic problems of an entire lease sale. 43 U.S.C. §§ 1334(a), 1340(c), 1351(h). Second, the standards for lease suspension and especially cancellation are high, requiring in the latter case findings that "serious harm or damage" to life, the environment, or one of several other interests is likely, that this threat will not "decrease to an acceptable extent within a reasonable period of time," and that "the advantages of cancellation outweigh the advantages of continuing" the lease or permit in question. 43 U.S.C. § 1334(a)(2)(A). Meeting states' general consistency problems with a lease sale through a lease-by-lease application of these provisions would, to say the least, be a cumbersome process. Finally, if a lease is cancelled, in many

of *Suffolk v. Department of the Interior*, 562 F.2d 1368 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978), while holding that consideration under the National Environmental Policy Act of specific pipeline routes from OCS lease sites could be deferred until more information was available at later stages, also held that NEPA fully applied at the lease sale stage. Further, the court allowed the deferral of consideration of the pipeline routes until later stages because it found that the agency would still have full discretion to consider that issue and, if appropriate, reverse its actions at those later stages. Here, due to the pyramidal structure of OCS leasing, basic decisions by DOI at the lease sale stage, such as choice of lease stipulations and tract selection, cannot easily be undone at later stages.⁴⁷

Nor does judicial interpretation of the Endangered Species Act support petitioners' argument for deferral of application of the CZMA consistency provisions to later phases of Lease Sale 53. While in *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980), the court would not enjoin a lease sale because of the possibility of jeopardy to an endangered species at later phases of the OCS leasing process, it so determined because the ESA had properly been applied to the lease sale stage and a finding of no jeopardy at that stage had been made by the relevant federal agency.⁴⁸ *Id.* at 607-610. Further, the court found

circumstances the lessee will be entitled to compensation, a further impediment to use of the cancellation provisions to deal with generic problems. 43 U.S.C. § 1351(h)(2)(C).

⁴⁷*Conservation Law Foundation v. Andrus*, 623 F.2d 712 (1st Cir. 1979), is also cited by DOI in support of its theory that NEPA (and by analogy, CZMA) application can be deferred to later stages of the OCS process. DOI Br. at 29 n. 22. That opinion, which examined whether an impact statement on a lease sale was sufficiently detailed, offers no support for the proposition for which DOI cites it.

⁴⁸DOI also suggests that, since the ESA would not prevent Lease Sale 53 from going forward although activities in later phases might jeopardize an endangered species, neither could California's con-

that specific lease stipulations had been imposed to ensure the species' freedom from jeopardy. *Id.* at 610. In other words, the requirements of the ESA were not avoided at the lease sale stage, which is of course exactly what DOI wishes to do here as regards the requirements of the CZMA. Instead, the court in *North Slope Borough* found that ESA concerns had been properly identified and addressed. DOI here owes no lesser duty to California as regards CZMA concerns.

CONCLUSION

For all of the foregoing reasons, we respectfully request that this Court affirm those portions of the Ninth Circuit's and District Court's decisions that the Department of the Interior has petitioned this Court to review.

Respectfully submitted,

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cerns about the consequences of Lease Sale 53 upon the sea otter affect the conduct of the sale under the CZMA. DOI Br. at 46-47 n. 43. This argument ignores the fact that the provisions of the California Coastal Management Program are not identical to those of the ESA and, thus, that some degree of harm to the sea otter short of the likelihood of jeopardy to the survival of the species that triggers the ESA might be inconsistent with those provisions.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1983

WESTERN OIL AND GAS ASSOCIATION, *et al.*,
Petitioners,

v.

THE STATE OF CALIFORNIA, *et al.*,
Respondents.

**REPLY BRIEF OF PETITIONERS
WESTERN OIL & GAS ASSOCIATION,
ET AL.**

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**REPLY BRIEF OF PETITIONERS
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**I. RESPONDENTS HAVE NOT REBUTTED ANY OF THE
ESSENTIAL ELEMENTS OF WOGA'S ARGUMENT.¹**

Our opening brief set forth four basic propositions in support of our argument that the selection of OCS tracts for leasing is not a federal activity "directly affecting" the coastal zone within the meaning of Section 307(c)(1) of the Coastal Zone Management Act, 16 U.S.C. 1456(c)(1) (CZMA): (1) The "1953 Compromise" embodied in the

¹ The brief which Western Oil & Gas Association, *et al.*, filed as petitioners in No. 82-1327 will hereafter be cited as "WOGA Br." Our brief as cross-respondent in No. 82-1511 will be cited as "WOGA Resp. Br." The briefs of respondents in Nos. 82-1326 & 82-1327, State of California, Natural Resources Defense Council, *et al.*, and County of Humboldt, *et al.*, will be cited as "Cal. Br.," "NRDC Br.," and "Local Gov. Br.," respectively. The briefs of *amici curiae* Coastal States Organization, *et al.*, Alaska, and New Jersey will be cited as "CSO Br.," "Alaska Br.," and "N.J. Br.," respectively.

Outer Continental Shelf Lands Act, 43 U.S.C. 1331, *et seq.* (OCSLA), and the Submerged Lands Act, 43 U.S.C. 1301, *et seq.*, prescribed clear-cut lines of federal and state authority over the leasing of OCS lands; (2) an intention to depart from these clearly delineated lines should not be assumed, absent a clear statement in subsequent legislation; (3) Section 307(c)(1) of the CZMA contains no such clear statement either on its face or in its legislative history; and (4) the amendments in 1976 to the CZMA and in 1978 to the OCSLA evidence no congressional intention to depart from the 1953 resolution of state-federal control over OCS leasing decisions.

Neither respondents nor the *amici curiae* supporting them have advanced anything to counter any of the fundamental underpinnings of WOGA's argument.

A. Congress in 1953 Settled the Controversy Between the State and Federal Governments Over Ownership of the OCS.

Respondents argue that Congress retained the power, following its adoption of the 1953 Compromise, to provide the States with additional authority over OCS leasing. (NRDC Br. 6). This, of course, contributes nothing to the point at issue—did Congress subsequently exercise that power when it adopted or amended the CZMA?

They also rebut an argument, which WOGA did not make—"that the OCSLA is the sole vehicle" through which authority over the OCS can be exercised (*id.* at 4)—by pointing to the application of general federal environmental statutes to the OCS. (*Id.* at 8-9 n.7; *see also* Cal. Br. 33 n.53; Local Gov. Br. 43). But obviously, Congress' inclusion of OCS-related activities within the ambit of general federal environmental statutes has nothing to

do with the 1953 resolution of the state-federal proprietary control issue.²

B. The "Clear Statement" Doctrine Is Applicable Here.

Respondents note that the clear statement doctrine has sometimes been used out of "solicitude for legitimate state concerns" and thus find "irony" in WOGA's reliance upon it here. (NRDC Br. 7 n.5). Notably, they do not (and could not) explain this Court's application of the doctrine in *Ruckelshaus v. Sierra Club*, ____ U.S. ____, 51 U.S.L.W. 5132 (July 1, 1983), on these grounds. Similarly, they offer no principled argument why solicitude for legitimate federal concerns, such as ownership and control over the OCS, should not be protected by the doctrine.

C. Neither Section 307(c)(1) Nor Its Legislative History Constitutes a Clear Statement of Congress' Intention To Provide the States with Authority To Apply CZMA Programs To Bar Leasing of Federal OCS Lands.

Far from arguing that Section 307(c)(1) contains a clear statement of congressional intention to extend consistency review to the selection of OCS tracts for leasing, respondents state that the meaning of the term "directly affecting" is unclear. (Cal. Br. 21; NRDC Br. 19-20; CSO Br. 6). Moreover, instead of adopting a "plain meaning" approach to Section 307(c)(1), respondents concede that a

²The Local Governments refer to the Clean Air Act, 42 U.S.C. § 7401, as supposedly typifying the approach embodied there and in the CZMA of permitting States to have a significant role in addressing environmental or resource issues. (Local Gov. Br. 16). They fail to mention, however, that the the Clean Air Act does not apply to the federal OCS, in the light of the Secretary of the Interior's "comprehensive" responsibilities under the OCSLA. *California v. Kleppe*, 604 F.2d 1187, 1192 (9th Cir. 1979).

"liberal," "expansive," or "broad" definition of the term is needed to support their position. (Cal. Br. 9 & n.12, 47). Further reflecting their concession that the statute on its face does not support them, respondents offer a variety of formulations for the "directly affecting" test of that section, none of which ascribes any meaning to the term "directly." (See, e.g., Local Gov. Br. 26-27; NRDC Br. 2-3, 21-22; N.J. Br. 11-12).

Respondents attempt to obscure the lack of support for their position in the language of Section 307(c)(1) by citing other portions of the CZMA or its legislative history which refer in general terms to OCS activities. (Cal. Br. 19 n.31, 29-30 n.48; NRDC Br. 13 n.12, 36-37). However, as *amici* CSO admits, the issue in this case is "when" not "whether" the CZMA applies to an OCS project. (CSO Br. 5).³ Plainly, Congress was concerned that those stages of OCS projects having actual effects on state coastal zones be subjected to CZMA consistency review, and it accordingly delineated in Section 307(c)(3)(B) the way in which state programs apply to OCS exploration and development/production, when such impacts normally first arise. This action does not support the application of Section 307(c)(1) to the earlier OCS leasing stage when, as here, it gives rise to no such impacts.⁴

Instead of finding a clear statement in the statute to support them, respondents ask the Court to infer, from

³ CSO's admission refutes California's charge that Interior's construction of Section 307(c)(1) permits OCS projects "completely [to] escape compliance with the CZMA . . ." (Cal. Br. 23), as well as NRDC's argument that WOGA believes the OCSLA "completely subsumed" the CZMA (NRDC Br. 10).

⁴ Similarly, those provisions of the CZMA requiring States to make adequate provision for the national interest associated with coastal zone related energy facilities pertain to state authority under Section 307(c)(3)(B) to regulate the exploration and development production

(Footnote continued)

what they assert are the purposes of the CZMA, Congress' intention to apply Section 307(c)(1) to OCS leasing. Thus, California states that "effectuating the purpose of [the CZMA] is critical to [its] interpretation" (Cal. Br. 8), while NRDC describes as the first of the "best sources of the interpretation of [Section 307(c)(1)]" not its language, but rather "the purposes and policies behind the [CZMA]" (NRDC Br. 2; *see also* CSO Br. 7). While these policy arguments are themselves misconceived, *see pp.* 12-17, *infra*, the important point here is that reliance upon such a policy-based approach to the statute, in and of itself, concedes that the CZMA on its face contains no clear statement to support respondents.

Finally, respondents have identified no clear statement in the contemporaneous legislative history of Section 307(c)(1) to support them.⁵ Instead, they rely upon a passage from a 1971 Senate Report, which stated that waters under federal jurisdiction having a "functional interrelationship" with waters in the coastal zone should be administered consistently with state CZMA programs. (*See, e.g.*, Cal. Br. 12). However, since the version of Section 307(c)(1) that was then before the Senate Committee was specifically limited to federal activities

stages of an OCS project. (*See, e.g.*, CSO Br. 9; Local Gov. Br. 9). That these provisions of the Act do not support respondents' construction of Section 307(c)(1) is revealed by the fact that they were not made a part of the CZMA in 1972 when that section was enacted, but instead were added to the statute in 1976 when Congress modified Section 307(c)(3) to specify the application of the statute to the later stages of OCS projects. *See, e.g.*, Section 305(c)(8), 16 U.S.C. 1454(c)(8), which was added to the CZMA by Pub. L. No. 94-370, July 26, 1976.

⁵ CSO admits that the "legislative history does not explain why Congress" substituted "directly affecting" for "in" the coastal zone. (CSO Br. 6-7).

"in the coastal zone," it is obvious that the Committee could not have contemplated that Section 307(c)(1) would extend to OCS activities on federal waters.

D. The 1976 CZMA Amendments and the 1978 OCSLA Amendments Do Not Reflect Congress' Intention To Subject the Selection of OCS Tracts for Leasing to State CZMA Programs.

Respondents argue that Congress' determination in 1976 not to amend Section 307(c)(3) to include the term "lease" is consistent with the belief that Section 307(c)(1) already applied to the selection of OCS tracts for leasing. (NRDC Br. 32; CSO Br. 27). Respondents, however, fail to cite the remarks of a single member of Congress to support this hypothesis. To the contrary, the Senate Committee, which first proposed to add the term "lease" to Section 307(c)(3), stated that this amendment would require the Secretary of the Interior to consult with governors before issuing leases. (WOGA Br. 40-41).⁶

Instead of rejecting the proposed amendment to Section 307(c)(3) as being redundant in the manner now suggested by respondents, the requirement of consistency review at the leasing stage of an OCS project was debated and rejected on the merits. (WOGA Br. 41-42). Had Congress believed that the selection of OCS tracts for leasing was already subject to Section 307(c)(1) consistency review, surely at least one member would have

⁶ California quotes the 1975 Senate report for the proposition that "full implementation" of the CZMA would include applying the consistency provisions of the Act to "the decision to lease large tracts of the OCS. . ." (Cal. Br. 27). However, the proposal to add the term "lease" to Section 307(c)(3) to achieve this result was ultimately rejected. The same observation vitiates NRDC's reliance upon the 1976 House Report. (NRDC Br. 31-32).

mentioned this fact during consideration of the 1976 CZMA amendments.

Similarly, nothing in the 1978 amendments to the OCSLA evidences Congress' intention to permit States to apply their CZMA programs to the selection of OCS tracts for leasing. To the contrary, as we have previously argued (WOGA Br. 24-27), Congress prescribed in Section 19 of that Act, 43 U.S.C. § 1345, quite different arrangements for state input into this decision.

Respondents make much of a footnote in a 1977 House Report, which recognized that "lease sales . . . must comply with 'consistency requirements' " under the CZMA. (*See, e.g.*, NRDC Br. 39).⁷ However, as we previously explained (WOGA Br. 26 n. 19), this fragment from the massive legislative history underlying the 1978 amendments can be explained as a recognition that, on occasion, certain limited aspects of the leasing stage of an OCS project may give rise to direct coastal zone impacts which create consistency issues under Section 307(c)(1). Permitting States to require CZMA consistency for those unusual cases involving such leasing-stage impacts does not constitute the basis for permitting them to use their programs routinely to challenge the Secretary's selection

⁷ NRDC also relies upon committee prints to support its argument that Section 307(c)(1) applies to OCS leasing. (NRDC Br. 38). These prints do not even purport to communicate the intention of members of Congress. Moreover, they represent such a misunderstanding of the application of the CZMA to the OCS process that they are entitled to no consideration whatsoever. For example, the 1976 committee print of the House *Ad Hoc* Committee on the OCS, 94th Cong., 2d Sess., *Effects of Offshore Oil and Natural Gas Development on the Coastal Zone* erroneously reports that "the Secretary of the Interior can withhold approval of a State's Coastal Zone Management Plan if the plan interferes with the 'national interest' of the nation." (*Id.* at 228-29).

of OCS tracts for leasing.^{*} Exercise of the former authority is consistent with Section 19 of the OCSLA, since it merely gives States a voice in the design of some limited aspects of an OCS project; the latter authority, on the other hand, puts them in a position to supercede Section 19 and challenge the Secretary's basic proprietary decision to engage in leasing itself.⁹

Moreover, it is clear that state representatives who testified during the consideration of the 1978 amendments to the OCSLA did not then view the CZMA as granting States authority with respect to the selection of OCS tracts for leasing. Thus, a California witness testified that the State would not have "any voice in major petroleum production off [its] coast with all of their attendant offshore problems until major changes are made in

^{*} WOGA's and the federal defendants' recognition that Section 307(c)(1) does apply at the leasing stage to deal with any direct effects on the coastal zone which might occur then answers respondents' arguments that we are seeking an implied exemption from the CZMA for OCS projects. (Cal. Br. 24-25). In this case, no leasing-stage impacts were identified by the lower courts.

⁹ The substantial difference between applying Section 307(c)(1) to deal with occasional leasing-stage impacts and routinely applying it to challenge the Secretary's selection of OCS tracts refutes CSO's argument that our "concession" as to the application of Section 307(c)(1) at the leasing stage contradicts our reliance upon the 1953 Compromise of federal-state proprietary interests in the OCS. (CSO Br. 27 n.18). Moreover, this distinction answers the argument (NRDC Br. 32; CSO Br. 29) that we inconsistently rely on the 1976 CZMA legislative history not to extend the Act generally to "leases," while conceding that it can apply to leasing-stage impacts. CZMA review of "leases" would have allowed review of the Secretary's selection of OCS tracts; such review of isolated leasing-stage impacts rarely, if ever, would lead to review of tract selection.

Federal law."¹⁰ On this basis, California urged the adoption of Section 19 of the OCSLA to fill a gap which it perceived in existing federal law:

"It is for situations like these—where there is a clearly identifiable state interest—that we see the need for a process which would allow the governor to negatively nominate tracts and have that decision accepted by the Interior Secretary unless he makes specific national interest findings to justify a contrary conclusion."¹¹

California's recognition that existing law—*i.e.*, the CZMA—did not provide the States with adequate input into the decisional process for the selection of OCS tracts was echoed by Alaska and Massachusetts, two of the other States that now seek as *amici* to convince the Court that Section 307(c)(1) of the CZMA, enacted in 1972, gives them greater authority than Section 19 of the OCSLA.¹²

¹⁰ Hearings on S.9 Before the Senate Comm. on Energy and Natural Resources, 95th Cong., 1st Sess. 575 (1977) (Statement of Bill Press, Director, California Governor's Office of Planning and Research).

¹¹ *Id.* at 584. In criticizing the adequacy of existing federal law, California, of course, was fully aware of the application of the CZMA to OCS development activities. For on the very same page of the testimony urging passage of Section 19, California's witness recognized the application of the CZMA to the later stages of an OCS project. *Id.*

¹² See *id.* at 514 (Statement of Robert LaResche, Alaska's Commissioner of Natural Resources); Hearings on H.R. 1614 Before the House *Ad Hoc* Select Comm. on the OCS, 95th Cong., 1st Sess. 671-72 (1977) (Statement of Evelyn F. Murphy, Massachusetts' Secretary of Environmental Affairs).

II. RESPONDENTS' RELIANCE UPON COMMENTARY BY CONGRESSIONAL COMMITTEES IN 1980 WITH RESPECT TO THE CZMA DOES NOT SUPPORT THE DECISION BELOW.

In our opening brief, we discussed the skepticism with which a court should proceed in reviewing post-hoc legislative materials. (*See also* CSO Br. 13 n.7 ("recogniz[ing] the hazards of relying on subsequent legislative history")). The very cases upon which respondents rely in urging this Court to give decisive weight to the 1980 committee commentary on Section 307(c)(1) undermine their position.

In *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980), this Court construed a 1920 statute by, *inter alia*, examining 1931 Senate hearings:

"The 1931 Senate hearings were called specifically to review the *Freeman [v. Summers]*, 52 L.D. 201 (1927) case for fear that another 'Teapot Dome' scandal was brewing. Rarely has an administrative law decision received such exhaustive congressional scrutiny. And following that scrutiny, no action was taken to disurb the settled administrative practice; rather Senator Nye advised the Interior Department to continue patenting oil shale claims." *Id.* at 673 n.12.

Here, far from endorsing prior administrative construction of the CZMA, the 1980 House Report stated that it was "disappointed" there had been no administrative resolution of the Section 307(c)(1) "directly affecting" issue as it applies to OCS leasing. H. Rep. No. 1012, 96th Cong., 2d Sess. 34 (1980). It went on to note that

"In light of the initiative to issue regulations defining the term 'directly affecting,' the committee be-

believes it is premature to amend section 307 to redress the problem which has emerged." *Id.*¹³

Finally, the 1980 committee reports, which NRDC concedes are "hardly . . . model[s] of clarity" (NRDC Br. 34 n.36), do not unequivocally state that Section 307(c)(1) should be applied to OCS tract selection. The House Committee merely stated that the section should

"apply whenever a Federal activity ha[s] a functional interrelationship from an economic, geographic, or social standpoint with a State coastal program's land or water use policies. . . . Thus, when a Federal agency initiates a series of events of coastal management consequences, the intergovernmental coordination of the Federal consistency requirements should apply." H. Rep. No. 1012 at 34.

The first justification offered by the House Committee for this approach was that, *inter alia*,

"it allows Federal agencies to avoid the irretrievable commitment of resources for Federal activities likely to lead to results inconsistent with the requirements of approved state programs." *Id.*

However, courts adjudicating leasing stage OCS cases have consistently held that, in the light of Interior's authority to regulate the later stages of an OCS project, the

¹³ The other cases relied upon by respondents are inapposite. In *Seatrains Shipbuilding Corp. v. Shell Oil Company*, 444 U.S. 572 (1980), the court justified its reliance on post-enactment legislative history by reasoning that Congress had rejected a proposed amendment on the very ground that it was unnecessary in the light of prior administrative interpretation. In *Bell v. New Jersey*, ___ U.S. ___, 103 S. Ct. 2187, 2192-94 (1983), the court relied on 1978 amendments to assess the scope of a 1970 statute because the amendments were necessarily premised upon the adoption of a particular interpretation of the 1970 Act.

lease sale itself is not an "irretrievable" or "irreversible" commitment of resources.¹⁴

The 1980 Senate Report stated only that

"the Department of the Interior's activities which preceded lease sales were to remain subject to the requirements of Section 307(c)(1). As a result, intergovernmental coordination for purposes of OCS development commences at the earliest practicable time in the opinion of the Committee, as the Department of the Interior sets in motion a series of events which have consequences in the coastal zone." S. Rep. No. 783, 96th Cong., 2d Sess. 11 (1980).

Neither the federal nor WOGA petitioners dispute that Section 307(c)(1) applies to the so-called pre-leasing activities of the Department of the Interior; it does require consistency determinations for those aspects, if any, of the OCS leasing stage which "directly" affect the coastal zone. (See pp. 7-8, *supra*; WOGA Br. 26 n.19). But the selection of OCS tracts for leasing does not "directly" affect the coastal zone simply because later exploration and development/production activities might do so.

III. RESPONDENTS' POLICY ARGUMENTS DO NOT SUPPORT THEM.

A. The OCSLA Provides Sufficient Environmental Protection and Coastal State Co-Operative Mechanisms.

Respondents contend that a "liberal" construction of the CZMA is necessary to permit rational coastal planning and protection. This argument is ultimately pre-

¹⁴ *County of Suffolk v. Secretary of the Interior*, 562 F.2d 1368, 1390 (2d Cir. 1977), cert. denied, 434 U.S. 1064 (1978); *Conservation Law Foundation v. Andrus*, 623 F.2d 712, 714-15 (1st Cir. 1979); *North Slope Borough v. Andrus*, 642 F.2d 589, 607-09 (D.C. Cir. 1980).

mised on the assertion that the CZMA and the OCSLA serve "vastly different" national purposes—the CZMA protecting the environment and the OCSLA "focus[ing] upon the development of the mineral resources of the OCS." (NRDC Br. 10; *see also* Local Gov. Br. 21-22, 41). On this basis, they contend that, if OCS leasing is not constrained by the CZMA, it will proceed without adequate environmental safeguards or coastal state planning mechanisms.

However, as even California recognizes, the OCSLA does not focus solely upon expeditious resource development, but "also makes clear Congressional intent to protect the environment." (Cal. Br. 41 n.70; *see also* CSO Br. 24). Thus, the Act's purposes repeatedly refer to protection of the environment,¹⁵ and it is embedded with provisions requiring the most careful attention to environmental concerns.¹⁶

Indeed, the very policy which respondents claim can be furthered only by their construction of the CZMA—the participation of State and local governments in the planning stages of an OCS project—is specifically recited in the OCSLA and specifically implemented for every stage of an OCS project, including leasing. (*See* WOGA Br. 22-23).¹⁷

¹⁵ *See, e.g.*, 43 U.S.C. §§ 1802(2), (3), (7).

¹⁶ *See, e.g.*, 43 U.S.C. §§ 1334(a)(2)(A), 1344(a)(2) & (3), 1346, & 1351(h)(1)(D).

¹⁷ Respondents seek to distinguish the scope of Section 19 of the OCSLA from that of Section 307(c)(1) of the CZMA by arguing that the former permits "any coastal states that would be affected" by leasing to make recommendations and that the latter provides authority only to States that have approved CZMA programs. (NRDC Br. 12; *see also* CSO Br. 24-25 & n.17). However, respondents' and the lower courts' conception of the "direct" effects of leasing is so broad that virtually any coastal state that would have Section 19

(Footnote continued)

B. The CZMA Does Not Contemplate Premature Review Of Impacts.

Respondents' contend that denying them the opportunity to apply CZMA programs at the leasing stage results in a "piecemeal" approach and prevents them from reviewing an OCS project "as a whole." (Local Gov. Br. 28-29; NRDC Br. 45-46). But this argument begs the question that is before the Court—whether Congress intended for States to have general authority under Section 307(c)(1) to review OCS projects as a whole or whether, instead, it intended that state CZMA programs be applied to assess specific coastal zone effects at the time they are anticipated.¹⁸

A construction of Section 307(c)(1) as applying only to leasing-stage impacts, rather than allowing a broad overview of all impacts which might occur at later stages, is

authority could also invoke its CZMA program at the leasing stage. Moreover, 28 states or territories, including virtually every one affected by OCS activities, have approved CZMA programs. (CSO Br. 3).

¹⁸ The Local Governments unwittingly undermine their own position by relying upon the opinion of the Department of Justice concerning application of Section 307(c)(1) to OCS preleasing activities. As the Department stated:

"It is well possible that some of the preleasing activities of the Secretary of the Interior will give rise to consistency problems which cannot be reviewed at all under the paragraph B procedure [307(c)(3)(B)], or for which such review comes too late." (Local Gov. Br. 30).

We have conceded the application of Section 307(c)(1) to leasing-stage impacts, if any, associated with an OCS project. The issue in this case is whether that section also permits leasing-stage review of exploration and production/development stage impacts that are later reviewable under Section 307(c)(3)(B).

Certainly, the insistence that Section 307(c)(1) review be utilized to prescribe stipulations for leases (*id.* at 33-34; CSO Br. 17) cannot

(Footnote continued)

strongly supported by Section 307(c)(3)(B) of the CZMA. That section provides that

"any person who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the [OCSLA] . . . shall, with respect to any exploration, development, or production described in such plan and affecting any land use or water use in the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with such state's approved management program. . . ."¹⁹

Thus, States clearly are not permitted at exploration to speculate about the later impacts upon the coastal zone that may arise at the development/production stage. Whether this is called "piecemeal" review or is characterized as preventing States from prematurely applying their CZMA programs to deal with coastal zone impacts that are only hypothetical and speculative at early stages of an OCS project, it was clearly the intention of Congress that CZMA review relate to specific impacts at the stage when they might arise, not a project in general and all its potential effects.¹⁹

justify invocation of CZMA programs to challenge the selection of OCS tracts for leasing. Moreover, respondents offer no examples of the type of issue that must be addressed through lease stipulation, as opposed to later conditioning of exploration or development/production permits following Section 307(c)(3)(B) CZMA review.

¹⁹ Respondents' assertion of the need to have a broad overview of OCS projects through the CZMA prior to exploration and development/production ignores the fact that they have the right to exercise this type of broad scrutiny under Section 19 of the OCSLA, prior to the Secretary's selection of OCS tracts for leasing.

C. The Pyramidic Structure of OCS Leasing Obviates the Need for Leasing Stage Consistency Review.

Respondents claim that the definition of the term "lease" within the OCSLA guarantees OCS lessees the right to proceed with later stages of the project, so that CZMA review at the later stages is "too late" to be effective. (Cal. Br. 36-37). This argument ignores Section 8(b)(4) of the OCSLA, 43 U.S.C. § 1337(b)(4), which states that a lessee's rights are "conditioned upon . . . the approval of the development and production plan required by this Act," as well as Section 11(c), 43 U.S.C. § 1340(c), which requires Secretarial approval prior to exploration.

The degree to which respondents distort the OCS statutory scheme is perhaps best revealed by their contention that "due to the pyramidic structure of OCS leasing, basic decisions by DOI at the lease sale stage, such as choice of lease stipulations and tract selection, cannot easily be undone at later stages."²⁰ (NRDC Br. 49). However, as the D.C. Circuit recently reiterated:

"the [OCS] . . . process is 'pyramidic in structure, proceeding from broad-based planning to an increasingly narrower focus as actual development grows more imminent.' Additional study and consideration

²⁰ A related misconception is that the Department of the Interior determines or influences, at the leasing stage, whether oil will be pipelined or shipped by tanker, the flow of vessel traffic, the siting of onshore construction, and other related matters. (Cal. Br. 36-37). The pyramidic structure of OCS decision-making, however, postpones determination of those matters until later stages. As the court held in *County of Suffolk v. Secretary of the Interior*, 562 F.2d at 1379, the specification of pipeline routes, destination refineries, and other similar matters requires "endless hypothesis as to remote possibilities" which not even NEPA requires at the leasing stage of an OCS project.

is required before each succeeding step is taken." *California v. Watt*, 712 F.2d 584, 588 (D.C. Cir. (1983), *petition for rehearing pending*.²¹

The very point of such a pyramidal structure, as stressed by the framers of the OCSLA, is to provide a mechanism for continuous "review and evaluation of, and decision on" an OCS project after leasing has occurred and thus to avoid "extensive litigation prior to lease sales, when onshore and environmental impacts of production activity are not yet known." WOGA Br. 30, citing H. Rep. No. 950, 95th Cong., 1st Sess. 164 (1977). Respondents' insistence that their CZMA programs be applied at the leasing stage of an OCS project to govern tract selection on the basis of speculation about coastal zone impacts that cannot occur until much later is flatly inconsistent with the policies adopted by Congress in enacting the OCSLA.

IV. RESPONDENTS' AMBIGUITY CONCERNING THE IMPLICATIONS OF THEIR CONSTRUCTION OF SECTION 307(c)(1) CONDEMNS THEIR POSITION.

Although California's complaint boldly proclaimed that it has the last word in determining consistency issues (WOGA Resp. Br. 5-6), California now states that it would have no CZMA veto authority and that, if there is disagreement as to a consistency issue, the federal agency can proceed. (Cal. Br. 44-45). California, however, carefully hedges this position by preserving its right to sue (*id.* at 44 n.75) and asserting that courts should pay "substantial deference" to a State's construction of its CZMA program. (*Id.* at 43 n.73).

²¹ See also *North Slope Borough v. Andrus*, 642 F.2d 589, 593-94 (D.C. Cir. 1980); *California v. Watt*, 668 F.2d 1290, 1297 (D.C. Cir. 1981).

The Local Governments have a more expansive view of state authority. They claim that the States and indeed the localities themselves "make the basic decisions" with respect to balancing competing demands on the coastal zone caused by OCS projects. (Local Gov. Br. 10). They assert that federal agencies should give "substantial deference" to their interpretation of CZMA programs and obviously would invoke federal litigation to ensure this deference.

The CSO approaches the matter from still a different perspective. It argues that the balancing of energy and environmental issues raised by OCS leasing has already been accomplished by virtue of the Department of Commerce's approval of State CZMA programs. (CSO Br. 25-26). CSO apparently assumes that courts could examine a State CZMA program *de novo* to discern that balance.

Thus, rather than presenting a consistent or coherent view as to how CZMA programs would actually be applied at the leasing stage of OCS projects, respondents and *amici* simply rely on litigation in the federal courts to resolve the issue. At no point, however, do they suggest how a court is to choose between conflicting federal and state views of the general requirements of a CZMA program, nor do they identify any provisions of the CZMA or OCSLA that a court could consult in undertaking this task.² Moreover, respondents seek to perpetuate the uncertainty and confusion that would be created by the adoption of their construction of Section 307(c)(1) by attacking in their cross-petition the Ninth Circuit's efforts to introduce some measure of clarification via its

² While respondents assert that the "spectre of hypothetical state abuse of § 307(c)(1) consistency requirements is completely unfounded" (Cal. Br. 45-46), they do not deny that following the lower courts' decisions in this case, Massachusetts, New York, New Jersey, Mary-

(Footnote continued)

construction of the "maximum extent practicable" provision of the statute.

Ultimately, therefore, respondents' view of Section 307(c)(1) is that Congress gave States some undefined measure of authority over the disposition of federal OCS lands, without providing any guidance to the courts as to how CZMA consistency issues are to be resolved and without providing any alternative means for resolving such disputes. As we have submitted, it is simply inconceivable that Congress intended to plunge the proprietary aspects of OCS leasing into such a "morass." (WOGA Br. 45; WOGA Resp. Br. 37-38).

States can have their CZMA programs considered at the leasing stage of an OCS project without creating the confusion implicit in respondents' view of the CZMA. As we have previously pointed out (WOGA Br. 26-27), under Section 19 of the OCSLA the Secretary of the Interior is obliged to consider any provisions of state CZMA programs brought to his attention by a governor's recommendations and, indeed, he is directed to accept those recommendations if they result in an appropriate balance between national and state interests. Moreover, Congress has specifically provided a judicial remedy should the Secretary inadequately consider a governor's recommendations in the Section 19 OCSLA process.²¹

By declaring that the selection of OCS tracts for leasing does not "directly affect" a State's coastal zone under

land, Virginia, North Carolina, California, and several Alaska local governments have instituted Section 307(c)(1) actions to complain of various aspects of OCS lease sales. (See WOGA Br. 20 n.14; WOGA Petn. 9 n.10).

²¹ The "arbitrary or capricious" standard of review specified by Section 19(d), 43 U.S.C. § 1345(d), plainly requires the Secretary to

(Footnote continued)

Section 307(c)(1), but that CZMA programs must be considered in the Section 19 process when invoked by governors, this Court would harmonize the CZMA and OCSLA, serve what respondents assert is the CZMA policy interest of ensuring early consideration of state programs, and channel disputes into a congressionally prescribed judicial review mechanism.

CONCLUSION

The Ninth Circuit's decision that the selection of OCS tracts for leasing is a federal activity "directly affecting" a state's coastal zone should be reversed.

Respectfully submitted,

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consider all relevant matters brought to his attention by the State in the Section 19 process. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971).

Alaska notes that Interior's promulgation, under protest pending this litigation, of consistency determinations led to the imposition of stipulations for several OCS lease sales off Alaska which persuaded the State not to pursue leasing-stage litigation. (Alaska Br. 9-11). Alaska fails to note, however, that Interior considered Alaska's views as to these stipulations under both Section 19 of the OCSLA and the CZMA.

No. 82-1327-CFX
Status: GRANTED

Title: Western Oil and Gas Association, et al., Petitioners
v.
California, etc., et al.

Docketed:
February 8, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Vide:
82-1326
82-1511

Counsel for petitioner: Bruce, E. Edward

Counsel for respondent: Berger, Theodora, Kase Jr., Joseph,
Orr, Trent W., Beers, John Roger

Entry	Date	Note	Proceedings and Orders
1	Feb 8 1983	G	Petition for writ of certiorari filed.
2	Mar 11 1983		Brief of respondent State of California in opposition filed. VIDED.
3	Mar 16 1983		DISTRIBUTED. April 1, 1983
5	Apr 13 1983		Reply brief of petitioner Western Oil & Gas, et al. filed.
6	Apr 20 1983		DISTRIBUTED. May 12, 1983
7	May 16 1983		Petition GRANTED. The case is consolidated with 82-1326 and 82-1511 and a total of one hour is allotted for oral argument. *****
9	Jun 1 1983		Order extending time to file brief of petitioner on the merits until July 11, 1983.
10	Jul 11 1983		Brief of petitioner Western Oil & Gas, et al. filed.
11	Jul 11 1983		Joint appendix filed. VIDED.
12	Jul 19 1983	G	Motion of Western Oil and Gas Association, et al. for divided argument filed.
13	Jul 28 1983	G	Motion of Humboldt County, et al. for divided argument filed.
14	Jul 18 1983		Record filed.
15	Jul 18 1983		13 volumes of certified original record and C.A. proceedings received.
17	Aug 10 1983		Order extending time to file brief of respondent on the merits until August 20, 1983.
18	Aug 11 1983		Brief amicus curiae of Coastal States Organization, et al. filed. VIDED.
19	Aug 15 1983		Brief of respondent California filed. VIDED.
20	Aug 15 1983		Brief of respondents CA Counties of Humboldt, et al filed. VIDED.
21	Aug 13 1983		Brief of respondents NRDC, et al. filed. VIDED.
22	Aug 15 1983		Brief amicus curiae of New Jersey filed. VIDED.
23	Aug 15 1983		Brief amicus curiae of Alaska filed. VIDED.
24	Aug 30 1983		CIRCULATED.
25	Sep 8 1983		Motion of Western Oil and Gas Association, et al. for divided argument GRANTED. The request for additional time for oral argument is denied.
26	Sep 8 1983		Motion of Humboldt County, et al. for divided argument GRANTED. The request for additional time for oral argument is denied.
27	Sep 21 1983		SET FOR ARGUMENT. Tuesday, November 1, 1983. This case is consolidated with Nos. 82-1326 & 1511. (1st case)
28	Sep 21 1983		(1 hour argument)

No. 82-1327-CFX

Entry	Date	Note	Proceedings and Orders
29	Oct 5 1983	X	Reply brief of petitioners Western Oil & Gas, et al. filed.
30	Nov 1 1983		ARGUED.